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# American Bar Association JOURNAL



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## May, 1959




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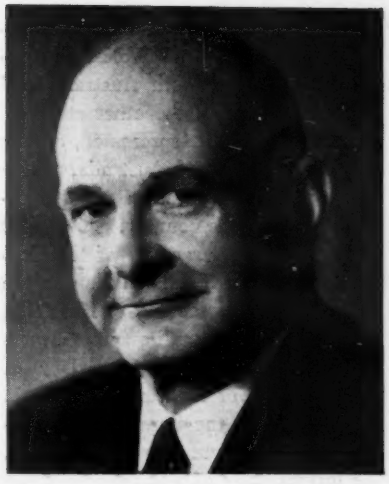
# The President's Page

Ross L. Malone



**Upper Ohio Valley Regional Meeting . . . Centenary Celebration of the Law Institute of Victoria . . . The Conference of the Inter-American Bar Association**

### *The Upper Ohio Valley Regional Meeting*

The Upper Ohio Valley Regional Meeting which was held in Pittsburgh, March 10-13, added another successful meeting to the history of regional meetings of the Association. Planned as a part of the bicentennial celebration of Pittsburgh, which is in progress throughout this year, it was a highly worthwhile and enjoyable occasion.

The Association is much indebted to Dr. Charles B. Nutting and Vincent M. Burke, co-chairmen who planned and conducted the meeting. Final registration figures totaled 1,014 persons of whom 834 were lawyer participants. The Assembly program, which included addresses by U.S. Senator Clinton P. Anderson, Chairman of the Joint Congressional Committee on Atomic Energy, Assistant Attorney General D. Malcolm Anderson, J. Lee Rankin, Solicitor General of the United States, and Arthur H. Dean, former U.S. Ambassador to South Korea, was interesting, timely and well received.

Increasingly, the focal point of interest in regional meetings is the continuing legal education program which is carried out through institutes and programs presented by the Sections and Committees of the American Bar Association. Participation by Sections and Committees of the Association at Pittsburgh was outstanding. The programs which they presented were selected with the interests of the area in mind. The attendance at all legal institutes was unusually good.

The efforts of many members of the Association are essential to the success of a regional meeting. The cooperation of the local Bar of the host city is an indispensable ingredient. In both respects we were most fortunate at Pittsburgh.

Co-chairmen Burke and Nutting made a record of diligence, tireless effort and good judgment which should inspire regional meeting chairmen who follow them.

Lewis F. Powell, Jr., of Richmond, Virginia, Chairman of the Regional Meetings Committee, has devoted a tremendous amount of time to the regional meeting program. One of his functions is to make certain that those responsible for each meeting have the benefit of the experience of the Association gained in earlier regional meetings. The fact that the two meetings this year at Portland, Maine, and Pittsburgh, Pennsylvania, have been so successful is attributable in part to the direction and cooperation of Mr. Powell and the members of his committee. I am glad to acknowledge the excellent assistance which I have received from them and to tell you of the tributes which have been paid to Mr. Powell's assistance by the co-chairmen of these meetings who have worked so closely with him.

Regional meetings are now well established in the program of the American Bar Association. They serve to provide a direct contact with the Association for many members who do not have an opportunity to attend the annual meetings of the Association. While not designed primarily to obtain new members, non-members are encouraged to attend and all non-members in attendance are invited to join the Association by a letter from the President following the meeting.

The two regional meetings held during this Association year have been very successful. I want to again express my appreciation to each person who contributed to make possible the success of the Portland and Pittsburgh meetings.

### *The Centenary Celebration of the Law Institute of Victoria*

Mrs. Malone and I deeply appreciated the privilege of representing the American Bar Association at the celebration of the Centenary of the Law Institute of Victoria, at Melbourne, Australia. The occasion was quite significant and was a thoroughly enjoyable experience from every point of view. The people of Australia, and particularly the legal profession, could not have been more gracious in their reception of us. The warmth of their hospitality exceeded all of our expectations.

Leslie Peppiatt, M.C., President of the Law Society of England, who was our guest at Los Angeles, and Walter S. Owen, Q.C., President of the Canadian Bar Association, attended as representatives of their respective organizations. Other international representatives who attended and participated in the ceremonies were: A. B. Buxton, President, New Zealand Law Society, S. Corea, Vice President, Incorporated Law Society of Ceylon, G. H. Goh, representing the legal profession of Malaya, K. T. Ooi, Chairman of the Singapore Bar Committee, U Yan Aung, Burmese Legal Remembrancer, and A. M. Hamilton, the High Commissioner in Australia for the Union of South Africa.

The organizations of the legal profession in New South Wales, Queensland, Tasmania, South Australia and Western Australia, the other states of Australia, were all represented, as was the Law Council of Australia, which is the national federation of legal organizations in the country.

The opening ceremony of the Centenary was held at Wilson Hall on the campus of the University of Australia, a magnificent new auditorium. Government officials and the Judiciary of Australia and of the State of Victoria participated in the impressive procession. The robes and wigs of the judges, the formal dress of all present and the impressive surroundings provided a memorable scene reminiscent in many respects of the opening ceremonies at Westminster Hall in London in 1957.

General Sir Dallas Brooks, K.C.B., K.C.M.G., D.S.O., K.S.T.J., the Governor of Victoria, who is the Queen's representative in the state, opened the celebration which was presided over by the President of the Law Institute of Victoria, J. R. Burt. The opening ceremony was attended by approximately 1,500 persons and many others were disappointed because they could not be accommodated at Wilson Hall. The opening ceremony was addressed by the President of the Law Society of England and the President of the American Bar Association. My subject was "The Legal Profession and World Peace".

The week which followed included a formal ball, the Centenary Dinner which was addressed by the Right Honorable R. G. Menzies, C.H., P.C., Q.C., Prime Minister of the Commonwealth of Australia, a special service at the Cathedral Church of St. Paul in Melbourne, and many other events, both professional and social which were both enjoyable and interesting.

Two days were devoted to comparative law discussions by the several overseas and inter-state guests. In these discussions the state of the law on various subjects was compared on the basis of monographs which had been furnished in advance by the participants. I want to acknowledge a special debt of gratitude to John Leary, Deputy Administrator of the American Bar Foundation, and to his staff for their invaluable assistance in preparing these monographs in advance of my departure for Australia. Through use of them I trust that I was able to appear quite well informed on numerous subjects running the gamut of substantive law and of law practice in the United States.

Two days were devoted to train trips to rural areas and smaller communities in the vicinity of Melbourne where we were the guests of the "country lawyers" of the area. The first such trip was to Yallourn and Morwell; the second to Ballarat and Geelong. These trips not only provided an opportunity to see the Australian countryside, but also to discuss the practice of law with practitioners in smaller communities.

Yallourn and Morwell are famous in Australia as the location of tremendous deposits of brown coal, which is used as fuel for steam turbine generating plants for the production of electricity. This is one of the major industrial developments in Australia in which the people in Australia take great pride.

Brown coal is a low-grade fuel known to exist elsewhere only in Germany. The machinery and process developed in Germany for the use of this fuel have been adapted in Australia and are the basis of these industrial developments. It is doubtful if coal of this type would be used in the United States at all. The lack of any domestic source of oil or gas and the shortage of other fuels apparently make its use economical in Australia.

Ballarat is famous as the scene of the gold discovery in 1850 which resulted in the first large migration to Australia. It is renowned today for the magnificent begonias which it produces which are said to be the equal of any in the world. They far exceed any that I have ever seen in size, variety of colors and beauty. The gold deposits have long since been depleted, but industrial development, which is occurring throughout Australia, has resulted in the continued growth of Ballarat.

Geelong is a smaller harbor than Melbourne, located approximately fifty miles from Melbourne, and is the port through which moves the greatest portion of the wool exported from Australia. It is also the site of the Australian plants of the Ford Motor Company, International Harvester Company, and of a tremendous new oil refinery of Shell Oil Company, which has had a marked impact upon the development of the harbor and of the city. The tour of Geelong harbor by boat which we enjoyed as the guests of the Harbor Commission was an experience long to be remembered.

Following adjournment of the Centenary celebration, we spent two days in Canberra under the auspices of the American Embassy, which had made arrangements for us to meet public officials of Australia and to see the capital city. It was modeled after Washington, D. C., and is located in a Federal District, which was established when competition between Sydney and Melbourne made its location upon "neutral ground" desirable. We were most appreciative of the hospitality extended us by Dr. Charles Spinks and other personnel of the Embassy and of luncheons in our honor given by Consul General Hall at Melbourne, and Consul General Waring at Sydney. A dinner party given at Canberra by Sir Kenneth Bailey, Solicitor General of Australia, was an especially enjoyable occasion. It was most gracious of Sir Kenneth and Lady Bailey to entertain in our honor.

Our last two days were spent at Sydney where we were guests of the Incorporated Law Institute of New South Wales. This is the organization of solicitors of the State of New South Wales, most of whom are located in Sydney. The beauty of the Sydney harbor and beaches, which are world renowned, measured up to all that we had heard of them. We particularly enjoyed the large collection of Australian animals at the Sydney Zoo, which included many kangaroo, wallaby, koala bears, and the rare duck-billed platypus.

The lawyers of Australia were most appreciative of the fact that the American Bar Association sent its President to participate in the Centenary Celebration—as is the President. Mrs. Malone and I will always treasure our memories of Australia and its wonderful people.

*(Continued on page 450)*

*published monthly*

# American Bar Association Journal

*the official organ of the American Bar Association*

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar to each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1953 or before; $8.00 for lawyers admitted between 1954 and 1956; and $4.00 for lawyers admitted in 1957 or later.

## Manuscripts for the Journal

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

***Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.***

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

**American Bar Association**

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**■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

### *Foreman First— Verdict Afterwards*

Mr. Charles L. Newman in the March, 1959, issue proposes a system whereby jurors would be selected from a panel consisting of members of the Bar. The suggestion comes too late. Legend has it that such a system was tried.

A jury of twelve astute lawyers was assembled for experimental purposes. They sat in judgment on the trial of a relatively simple property damage case involving a single plaintiff and a single defendant. The evidence was presented, the case argued by counsel and instructions submitted by the court. Thereupon the jury of lawyers retired to deliberate. Twelve hours later, no word had been received from the jury room and the judge sent his bailiff to get a report on the status of the deliberations. The bailiff knocked on the door of the jury room and shouted: "Gentlemen, are you approaching a verdict?" Through the door came the angry answer: "Hell, no, we can't even agree on a foreman."

WILLIAM I. CALDWELL
Woodstock, Illinois

### *The Right To Criticize Judicial Decisions*

It seems fair to assume that Chief Justice Warren has chosen to walk away in protest to open criticism of departures and innovations on the part of the public agency he was appointed to head. The intended implication from this protest would appear to be that the rank of a public servant provides a shield against adverse comment by men of recognized legal talent and regardless of the basis or reason which provoked such comment.

We have reached a new and strange level if the legal minds of our country all learn to chant "The Judge Can Do No Wrong".

I think lawyers should be the last to yield the right to speak when that right is exercised in furtherance of a sound and understandable system of jurisprudence, and this thinking follows my serving a period of twelve years on the Circuit and Supreme Courts of my state.

CHARLES R. HAYES
Deadwood, South Dakota

### *The Committee's Report and Public Relations*

I was dismayed to note the public-relations impact of the committee report recently endorsed by the House of Delegates of the American Bar Association, recommending congressional action to compensate for certain decisions of the Supreme Court of the United States relating to questions of internal security. In the Miami newspaper which I regularly read, for example, the front-page headline screamed that the Association had accused the Supreme Court of softness towards Communism.

I would scarcely suggest that the decisions of the Court must be immune from criticism, having myself recently been the author of a critical article. There is, however, a distinction between professional and objective criticism of a given decision, addressed to errors in premise or conclusion, on the one hand, and a demagogic and *ad hominem* attack on the Court, on the other. . .

ERNEST J. LONDON
Miami, Florida

### *The Segregation Cases . . . Equal Facilities Are Unequal*

Naturally I have read with a great deal of interest Justice Davis' article on "The States and the Supreme Court" in the March, 1959, issue of the JOURNAL.

At page 311 he says: "In the field of higher education, the Court abandoned the doctrine of separate but equal facilities in the cases of *Missouri* ex rel. *Gaines* v. *Canada*, *Sipuel* v. *Board of Regents*, *Sweatt* v. *Painter*, *McLaurin* v. *Oklahoma State Board of Regents*, and *Lucy* v. *Adams*. Thus, in the *School Segregation* cases, it was not surprising that the Court renounced the doctrine of *Plessy* v. *Ferguson* and applied to the area of primary education the principles announced in its prior decisions which dealt with secondary education".

I respectfully suggest that Justice Davis has seriously erred in both prongs of that statement. The Court did not abandon the separate but equal doctrines in the first four of the five cases cited, but specifically *applied* the separate but equal doctrine in those cases *as the controlling test*. The Court in the *School Segregation* cases in referring to those four cases specifically said of them: "In none of these cases was it necessary to re-examine the doctrine [of separate but equal] to grant relief to the negro plaintiff" (*op cit.*, page 492).

I lay to one side the fifth of them, *Lucy* v. *Adams*, as it was not decided until October 10, 1955, many months *after* the decision in the *School Segregation* cases. . .

In the *School Segregation* cases, the Court did not, as Judge Davis evidently thinks, say, in effect: "We have heretofore nullified the 'separate but equal' doctrine as applied to law and graduate schools for reasons heretofore stated;

*(Continued on page 428)*

# Defense Weapon

The telephone is a defense weapon —and an important one.

A manufacturer of rockets, for example, needs data or delivery on a specific part. He picks up his telephone, makes several Long Distance calls, and his problem is solved.

An unidentified aircraft is detected in flight by a radar installation. The information is relayed automatically and instantly over telephone cables to a defense center.

It is then flashed over the network of special Bell System telephone lines which link the country's entire system of continental defense.

The role of the Bell System does not stop there or with the thousands upon thousands of calls that are a part of the manufacture of countless items of defense.

Its Bell Telephone Laboratories are engaged in many important research and development projects for the government. These include the Nike Zeus anti-missile missile system and the guidance system for the Titan intercontinental ballistic missile.

Western Electric, the Bell System's manufacturing and supply unit, is producing the guidance and control equipment which is the heart and brains of the mighty Nike Ajax and Nike Hercules missile systems.

The Sandia Corporation, a subsidiary of Western Electric, continues to manage the Atomic Energy Commission's Sandia Laboratory, which develops, designs and tests atomic weapons.

Among many other Western Electric defense projects were the 3000-mile Distant Early Warning (DEW) Line in the Arctic and the "White Alice" communication system linking population centers and military installations in Alaska. Both were completed on schedule and turned over to the Air Force.

Another project for the Air Force was the design, production and supervision of installation of a communications system for a guided missile test range extending out to sea.

The backbone of this system is the special underseas cable that stretches 1370 nautical miles from Cape Canaveral in Florida to Puerto Rico. It provides an instant, secret, weatherproof means of transmitting data on missiles in flight.

Radar installations along the way spot the missile's flight position which is flashed continuously to the testing base by cable. So are signals from the missile itself.

Recently the U.S. Air Force asked us to add the communications phases of a ballistic missile early warning system to the other military projects handled by the Bell System.

The Bell System is primarily engaged in providing telephone service. But it gives top priority and its utmost effort to the needs of Government whenever it is called upon for work for which it is specially fitted by size and experience.

Particularly when it comes to protecting the country, it's good to use the best scientific knowledge available in the communications field.

**BELL TELEPHONE SYSTEM**

*(Continued from page 426)*

we now nullify it as to public schools."

What the Court did do (*op. cit.*, page 492) was to summarize these cases as holding that "*inequality* was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications". The word which I have emphasized demonstrates the application of the "separate but equal" doctrine in those cases, but a failure of it for specific reasons in each of those cases.

In the *Segregation* cases, the question was "directly presented" (*op. cit.*, page 492) as to whether the separate but equal doctrine "should be held inapplicable to public education . . . even though the physical facilities and other "tangible factors may be equal . . ."—an entirely different question.

The Court held, despite a hundred years of decisions to the contrary, that it should not. In so holding the Court did not extend the rulings of the "four cases" from "secondary" to "primary" education.

In a revolutionary mood, the Court "concluded that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" (*op. cit.*, page 495). Thus "*equal facilities* are unequal"—a rhetorical contradiction that must be left to psychologists, not lawyers.

The Court said, "This finding is amply supported by modern authority" (page 494).

What "modern authority"?

*Not* the law school and graduate school cases, *supra*, but an array of psychologists whose names and works are listed in footnote 11 at page 494, and whose biographies, backgrounds and history make most interesting reading.

These psychologists are new names in American jurisprudence.

In the law of public education, they have supplanted Judges Luther Day and Chief Justice Shaw and Chief Judge Ruger and Justice Woods and Chief Justice Taft, Chief Justice Hughes, and Justices Holmes, Brandeis, Stone, McReynolds, Van Devanter, Sutherland, Sanford, and Butler, who are typical of the scores of American jurists who had over a period of a century before May 17, 1954, decided that under American law and the American Constitution the doctrine of separate but equal had a very definite place under the equal protection clause of the Fourteenth Amendment.

CHARLES J. BLOCH

Macon, Georgia

## *No Polyglot Court . . . No Polyglot Government*

Law Day. What—and Why, Law Day? In this country, which brags about the education of the great public and its being a republic, if not a democracy, why do we have to emphasize *law*?

At whom is this, another *slogan*, aimed? Is it the public, or is it at some of the courts, or just whom? We are *sloganized* to death in this country, and many of the slogans are without actual *content*. . . This is true in this instance, unless you give the words content in some way, which I assume you will do on Law Day. Otherwise it is shooting at a blank target.

Next, there is a lot of talk by men such as our present President and past President about world enforcement of law among the nations. To me this is appealing as a theory, but it has little or no appeal as a practical matter, in view of our own Supreme Court's actions, and the Supreme Court is composed of our own people, while any world court would be a polyglot one. If we are not satisfied with the functioning of our own high Court—at least many of us are not—how can we expect satisfactory results from such a polyglot court? . . .

After all is said and done, is it not true that the large and powerful nations will dominate the scene if they work together? Otherwise, the large and powerful nations will find themselves like *Gulliver* in Lilliput, eventually brought down to the *level* of average of the small nations? This whole program, to me, is a *levelling* off, which is typically Communistic without the offensive word, and it therefore seems to me that while we denounce Russia, we are going to the same end, though by a different route. There are many roads leading to Rome, remember. . .

Anyhow, I, for one, am not willing to place the future generations in the hands of either a polyglot court or polyglot government, as I can see many things worse than wars, as undesirable as *they* are. So, Gentlemen, I hope you all will weigh the good expected as against the bad and will properly direct the points and to *where* they are most needed.

GEORGE WASHINGTON WILLIAMS

Baltimore, Maryland

## *He'll Take the Court's View*

After reading Joseph H. Wright's article, "The Employer's Liability Act: Does the Supreme Court Want It Repealed?" in the February JOURNAL, I am greatly saddened at the plight of the downtrodden railroad attorneys and the audacity of the horrible old Supreme Court for bothering to hear these cases.

However, I believe I can answer Mr. Wright's inquiry as to when the United States Supreme Court will stop upsetting instructed verdicts in favor of railroad companies. The probable answer is: just as soon as some of the ex-railroad attorneys and so-called "sound" businessmen now wearing judicial robes stop instructing verdicts in cases where inferences are so plain that a child could reasonably see the factual answer, and when difficulty of exact proof is recognized. Some of our good judges have never yet learned what a permissible inference is, or they somehow forget it when an insurance company or a railroad is involved.

Some of the greatest injustices which courts have perpetrated upon litigants have involved peremptory conclusions of "no evidence". It is the most vicious practice a judge can fall into, and it entails the expedient of playing blind or being impervious to lawful inferences and circumstances, to hold evidence "conjectural". No accusation of dishonesty is made—only reaffirmation of the value of the jury system is intended. Occasional mistakes are made both ways.

JOHN M. BARRON

Bryan, Texas

*(Continued on page 433)*

# The Government Contractor

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*(Continued from page 428)*

### *Chastisement of Court Degrades the Bar*

The chastisement of the U. S. Supreme Court in your February issue was hardly necessary to protect the financial position of the author's vested interest in the determination of FELA cases. The January stock digest shows the Illinois Central Railroad had earnings of $5.14 per share in 1958, and $5.06, $7.66, $8.61 and $7.68 in preceding years.

Criticism of *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, and commendation for the Vermont finding that a safe place to work was furnished despite the court's own description of the location being "only about 12 inches wide and a misstep might cause a fall of 18 feet", reflected upon the author's objectivity.

Condemning circumstantial evidence of negligence as conjectural, the defendant in *Lavender* v. *Kurn*, 327 U. S 645, urged that plaintiff's decedent, while switching train movements, had been murdered by some phantom person—a real masterpiece of speculation. In *Ellis* v. *Union Pacific Railroad*, 329 U. S. 649, plaintiff's evidence as reported, presented clear liability unless the "impartial" testimony contra by defendant's employees was accepted. Clearly, such conflict is best resolved by a jury and the placement of any "crass perjury", referred to by the author, made by such jury. Other cited cases revealed similar conflicts in evidence.

The author submits that "railroads are forced to pay any and all claims substantially on any basis demanded". However, the *Defense Law Journal*, in its latest volume, speaking for railroads and insurance companies, discusses six cases won by railroads, of which four are FELA cases.

Accordingly, no basis appears for condemning the Supreme Court for a belief that impartial jurors can better determine truth than can railroad counsel. Publication of an article referring to the highest court of our land in terms of a "judicial Robin Hood" which has "created a racket" doing "great damage" to the "morality of claimants" degrades the Bar as a whole and adversely reflects upon the editorial policies of its JOURNAL.

WILLIAM F. MCKEE
Mansfield, Ohio

### *The Court and Workmen's Compensation*

Mr. Joseph H. Wright's article "The Employers' Liability Act: Does the Supreme Court Want It Appealed" [45 A.B.A.J. 151, February, 1959], was overflowing with righteous indignation and justifiably so.

The Supreme Court has expanded beyond recognition our "law school concepts" of actionable negligence, and the two industries that have felt this expansion more than any other segment of society are the railroad and shipping industries.

It seems to the writer that the Court

*(Continued on page 434)*

has even gone further in the so-called maritime injury cases than in the railroad cases, as witnessed by its decisions in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415; *Grimes* v. *Raymond Concrete Tile Co.*, 356 U. S. 252, 78 S. Ct. 687; *Butler* v. *Whiteman*, 356 U. S. 271, 78 S. Ct. 734, and *Hahn* v. *Ross Island Sand & Gravel Co.*, 79 S. Ct. 266.

Any employee whose work is in any way connected with navigable waters can now raise a fact question as to whether he is a "seaman" under the Jones Act and the same expanded concept of legal liability is applied in these "seamen or maritime injury cases" as is applied in the railroad employee cases. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457; *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 78 S. Ct. 394.

The unfortunate result of this extension of "legal liability" and the abandonment of what we understand to mean "negligence", "proximate cause", "duty", "preponderance of evidence" is that some state and federal courts appear to be applying this same expanded theory of liability to ordinary negligence cases where the master-servant relationship is not present.

Workmen's compensation is worthwhile and humanitarian legislation, but it seems to the writer that we are being intellectually dishonest when we attempt to afford injured employees workmen's compensation by distorting all theories and concepts of negligence law.

KENNETH E. ROBERTS
Portland, Oregon

### *The United Nations As Nurse-Maid*

Paul Shipman Andrews makes a good case for the United World Federalists in his letter published in your issue of March, 1959.

However, it seems to me that he is mistaken in his belief that the proposed international federation can be accomplished through a mere strengthening of the existing United Nations. The latter is at present heavily committed to the total-government concept and does not hesitate to make pronouncements on minimum wages, paid vacations, etc., etc. In short, it is just the opposite of what a federal government should be. Its intention is to control every aspect of social life and it is without power to do anything. Judging by the American experience, a federal government should have power to act in its area which area should be narrow.

In my opinion, world federalists should aim to reduce the scope of the United Nations before increasing its powers. In short, what is needed is a bill of rights which will protect us from the proposed world federation. It might be possible to accomplish this through the existing structure of the United Nations, but I doubt it. The United Nations is already the captive of the welfare state, total-government concept and is already a bureaucracy with a vested interest in the continuation of its own vast schemes of catering to every corner of the globe.

I for one will find it hard to believe that the United World Federalists are really working for a limited new sovereignty so long as they think in terms of strengthening the United Nations with its absurd pretentions to become nurse-maid to the world.

ROBERT C. LEA, JR.
Philadelphia, Pennsylvania

### *The Forty-Ninth State Shows a Dangerous Trend*

Reference is made to your article in the December, 1958, issue on Alaska's Constitution. While we fully realize that the article is intended merely as a description of the constitutional provisions, it is important nevertheless that the reader be more fully informed on the background as it actually exists, as against the fervor that has apparently swept the country for "more states".

May I say that the public has been hornswoggled by politicians on the Alaska statehood issue. We now read that the first election has produced the astounding total of 30,000 votes. What cross-section of opinion can be obtained from such a situation? Why should a mere handful of voters, miles from American life, have the right to nominate national representatives with the attendant rights and privileges?

*(Continued on page 436)*

*(Continued from page 434)*

Our cities are entitled to more consideration than that.

One paragraph in the article points up the incongruity of the whole subject. "Executive departments are limited to twenty, etc." If the proportion of population to departments in other states (even Louisiana with its "record-breaking constitution", God bless her as a state which fights Communism in no uncertain terms) were compared, no doubt twenty departments for a handful of 200,000 people is an enormous proportion.

Just who comprises the 200,000? Here it is. There are 81,000 permanent inhabitants, 92,000 government employees and dependents and 33,861 native Indians, Eskimos and Aleutians. Many of the latter, no doubt, would never qualify for voting privileges in any American state.

The chance for political control is just a matter of years. Truly, the whole thing is a dangerous encroachment on American liberties...

This is a dangerous trend which is taking advantage of the great American sense of fair play. Look out for the blind "do gooders" in our midst.

JOHN SINGREEN
New Orleans, Louisiana

### *Urges Reading of Mr. Palmer's Article*

I read with a great deal of interest the article in the January, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL entitled "Resolving a Dilemma: Congress Should Implement Integration".

I was interested in what appeared to be the intensive study Mr. Palmer had made regarding the backlog of cases in the federal courts and his proposal that Congress create administrative tribunals to oversee the Supreme Court's decrees arising out of its decision to require integration of the races in schools.

While I have not had a chance to thoroughly study or digest the points raised by Mr. Palmer I think he has pointed out some interesting proposals. It is my hope that this article will be read by all members of the American Bar Association as there is some real food for thought contained in the article...

FRANK T. GALLAGHER
Supreme Court of Minnesota
St. Paul, Minnesota

### *He's Against Mr. Palmer's Integration Proposal*

In the January, 1959, edition of the AMERICAN BAR ASSOCIATION JOURNAL, an interesting article appeared by Mr. Ben W. Palmer, of Minneapolis, Minnesota, treating upon the subject of "Congress Should Implement Integration". As space is restricted for replies to articles appearing in the JOURNAL, I shall pass over the preceding sections of his article and confine myself to comments on the section headed, "A Solution—Administrative Agencies".

Does Mr. Palmer advocate the position that Congress should adopt such legislation as would further supplement the usurpation of its own legislative powers by the United States Supreme Court? I believe that while social engineering is a necessary phase of the development of our system of jurisprudence, recent decisions of our federal judiciary are causing us to lose the true perspective of our constitutional form of government. To add another federal agency to our already myriads of existing federal agencies would be a step too far in this direction.

The right of the President of the United States to appoint administrative tribunals for integration in states, counties, municipalities, or school districts of the several states points the way too closely to a centralized power which is now too prevalent in our central government. The continued trend of the Federal Government having voice in the functions of the state courts of the several states can only lead at a near future date to a nearly complete nullification of their powers, and perhaps the very existence of the state courts of the several states. Witness the recent happenings in Alabama when a federal judge cited a state court judge for contempt of court.

Such legislation can only further impair the rights of the people of the

several states to enjoy their liberties under our form of government as was established by our Constitution. Situations of this kind cannot be alleviated by formation of additional federal agencies with more cost to the taxpayers. Such a federal agency would be fertile soil in which to plant seeds of further bureaucracy. Such legislation as Mr. Palmer advocates in his article is diametrically opposed to the principles of our Government envisioned by the founders of our nation and the drafters of our Constitution.

GEORGE L. DAWSON

Augusta, Georgia

### *He Agrees with Mr. Rollinson*

I should like to add my wholehearted endorsement to the comments of Mr. Rollinson (45 A.B.A.J. 127) in regard to the lawyer-accountants and the new code. It seems quite obvious that the proponents of this measure have not invested the time, work, and money which would enable a man to be so qualified...

As one who has invested three additional years of college study and hundreds of dollars in order to better serve my clients in the fields of taxation and business, I fail to see the justice in this proposal. I seriously doubt that many other persons of similar experience and training will be found among the proponents of this measure.

GEORGE E. PUGH

Enid, Oklahoma

### *An Illustration of an "Ethical Handicap"*

The Jameson article on a "Proposed Code of Conduct, The Relationship of Lawyers and Accountants", carries a refreshing change from many doctrinaire discussions of Committees on Professional Ethics.

Judge Jameson founds his discussion on practical problems in several fields.

The following illustration points out so-called ethical handicaps in dealing with the ten thousand or more chemical patents that issue each year, that is in dealing with the 170,000 outstanding in the average year.

A fertilizer phosphate concentrate was being imported by the shipload in

apparent defiance of an outstanding patent.

The patent owners had satisfactory evidence that the concentrate in question was produced from a crude phosphate made by some flotation process. But was it the patented process?

That patented process worked because of the presence of a certain kind of tar in the amount of about a pound per ton in the flotation water. Another material used in about the same amount was covered in another patent.

The highly skilled chemists employed by the owner of the tar patent could suggest no method of proving that the tar patent was infringed by making that concentrate.

I was called in because of my knowledge of both industrial chemistry and of patent law. I said that any phosphate concentrated by the patented tar process would carry some of the tar adsorbed on the particles.

That tar, if present could be recovered and identified by washing the tar from a ten-pound sample of the concentrate with a suitable solvent, say mixed alcohol and ether.

The washed off tar was the tar of the tar patent, and proved infringement of it.

Is it necessary to handicap a handler of industrial chemicals in obtaining the help of a specialist in chemical patents by calling that phrase unethical advertising?

EDWARD THOMAS

New York, New York

P.S. This case is reported in *Amtorg Trading Co.*, 24 U.S.P.Q. 315.

# Nominating Petitions

***Alabama***

The undersigned hereby nominate Thomas G. Greaves, Jr., of Mobile, for the office of State Delegate for and from Alabama to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

Frank A. Massa, T. Massey Bedsole, Charles C. Hand, Alexander F. Lankford, III, W. B. Hand, C. B. Arendall, Jr., Paul W. Brock, Willis C. Darby, Jr., Michael J. Salmon, Vincent F. Kilborn, Leon G. Duke, Jr., George E. McNally, Thomas O. Howell, Jr., Charles R. Butler, George A. Tonsmeire, Z. B. Skinner, Jr., N. Q. Adams, Jack W. Sprinkle, Vivian G. Johnston, Jr., John W. Mobley, Lyman F. Holland, Jr., J. Thomas Hines, Jr., Samuel W. Inge, Ronald P. Slepian and W. Borden Strickland, of Mobile.

***Alabama***

The undersigned hereby nominate J. Edward Thornton, of Mobile, for the office of State Delegate for and from Alabama to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

Douglas Arant, J. Robert Fleenor, Harry R. Teel, David J. Vann, Ellene Winn, James A. Simpson, William L. Clark, John R. Thomas, James O. Haley and Memory L. Robinson, of Birmingham;

Gessner T. McCorvey, C. A. L. Johnstone, Jr., Ben D. Turner, R. F. Adams and Sam M. Johnston, Jr., of Mobile;

Edward E. Cobbs, Newman C. Sankey, James J. Carter, William Inge Hill, B. Maultsby Waller, Drayton N. Hamilton, J. T. Stovall, Louis G. Greene, Roman L. Weil and Frank H. Hawthorne, of Montgomery.

***California***

The undersigned hereby nominate Roy A. Bronson, of San Francisco, for the office of State Delegate for and from California to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

Harold R. McKinnon, Raymond A. Greene, Jr., George K. Hartwick, Max Weingarten, Edgar H. Rowe, Miles A. Cobb, Robert E. Friedrich, Reginald L. Vaughan, John G. Lyons, John H. Painter, James Farraher, Lawrason Driscoll, Donald J. Lawrence, Howard J. Finn, Hamilton W. Budge, Bailey Lang, George T. Cronin, William A. Farrell, Alvin J. Rockwell, A. B. Tanner, Sigvald Nielson, John A. Sutro, James Michael, Noel Dyer and Francis R. Kirkham, of San Francisco.

***Hawaii***

The undersigned hereby nominate J. Garner Anthony, of Honolulu, for the office of State Delegate for and from Hawaii to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

Joseph V. Hodgson, Chuck Mau, Arthur G. Smith, William L. Fleming, Milton Cades, J. Russell Cades, C. Frederick Schutte, Gilbert E. Cox, J. P. Russell, Marshall M. Goodsill, Jr., Heaton L. Wrenn, H. B. Kidwell, Tobias C. Tolzman, Livingston Jenks, Bert T. Kobayashi, Herbert Y. C. Choy, E. K. Kai, D. C. Hamilton, Dwight M. Rush, Frank D. Gibson, Jr., William W. Saunders, Dudley C. Lewis, Charles E. Cassidy, Thomas M. Waddoups and Richard C. Knight, of Honolulu.

***Massachusetts***

The undersigned hereby nominate Allan H. W. Higgins, of Boston, for the office of State Delegate for and from Massachusetts to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

John S. Mechem, Wilbur M. Jaquith, Joseph F. Knowles, Charles D. Post, Henry B. Hosmer, Leonard Wheeler, Preston H. Saunders, Marshall Simonds, Charles E. Goodhue, Richard M. Nichols, Paul H. Farrell, Raymond E. King, Donald J. Hurley, H. Brian Holland, Andrew H. Cox, Allen O. Eaton, Oscar M. Shaw and Warren E. Carley, of Boston;

Charles Fairman and Louis Loss, of Cambridge;

Livingston Hall, of Concord;

Milton J. Donovan, of Longmeadow;

Holbrook Campbell and Bernard Glazier, of Springfield;

Richard H. Field, of Weston.

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### *New Jersey*

The undersigned hereby nominate George Warren, of Trenton, for the office of State Delegate for and from New Jersey to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

Michael Bibko, Jr., of Bayonne;

Phidias L. Pollis and Morris N. Hartman, of Elizabeth;

Irving Riker, Charles Danzig, Charles Alan Phillips, Harold D. Feuerstein, Ward J. Herbert, Joseph Harrison, David Stoffer and Israel B. Greene, of Newark;

Hugh D. Wise, Jr. and William Miller, of Princeton;

Mario H. Volpe, William Abbotts, George Gildea, B. Braddock Dinsmore, Jr., William Reich, Edward B. McConnell, Arthur Teich, Lawrence N. Stein, Richard J. S. Barlow, Jr., Alexandria Kozak and Arthur S. Kelsey, of Trenton;

Leon S. Milmed, of Short Hills.

### *New Jersey*

The undersigned hereby nominate John H. Yauch, Jr., of Newark, for the office of State Delegate for and from New Jersey to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

James N. Butler, Lawrence M. Perskie, Robert H. Steedle and John Lloyd, Jr., of Atlantic City;

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Robert K. Bell and Joel A. Mott, Jr., of Ocean City.

# Antitrust Law:

# An Approach to Some Common Problems

by Edward R. Johnston • *of the Illinois Bar (Chicago)*

**Antitrust law bristles with so many complex economic problems that many lawyers—and even the courts—often seem reluctant to grapple with cases in the field. Mr. Johnston writes here for the average lawyer who has shunned antitrust law on the ground that it belongs to specialists. The antitrust laws, he declares, cut across most major business transactions and cannot be ignored if the lawyer is to give his clients proper advice. The first part of Mr. Johnston's article, dealing with Sherman Act problems, is published here. Next month, the concluding part of the article dealing with Clayton and Robinson-Patman Act problems will appear.**

Many lawyers in general practice are prone to regard antitrust law as a specialty, akin to patent or admiralty law, with which the average practitioner has slight concern. Granted that in the trial of a complicated antitrust case the services of specialists are desirable, no lawyer who would adequately represent his clients can afford to be without a working knowledge of these important federal laws and their judicial interpretation.

Today the antitrust laws, like the federal tax laws, cut across most major business transactions. The purchase and sale contracts, even the employment contracts, which you draft for your client; his price lists, methods of sale, discounts, and other allowances to customers; his acquisition of other businesses by purchase or merger; the trade associations and other industry groups in which he participates—these and numberless other activities all have antitrust implications.

Couched, as most of the antitrust acts are, in general terms having, as Mr. Chief Justice Hughes pointed out, "... a generality and adaptability comparable to that found to be desirable in constitutional provisions",[1] there are few rules of thumb which you can apply to a given set of facts to solve your problems. At best you have before you only certain standards of conduct which, as the courts have interpreted these statutes, seem to represent the fundamental objectives which the acts were designed to attain. It may be worthwhile, therefore, speaking to the general practitioner, to spell out some of those standards by which you endeavor to test the legality of specific conduct submitted for your approval. I say "endeavor to test" advisedly, for we must recognize that there are many borderline cases in the antitrust field which do not lend themselves to definitive judgments.

## I.

### *The Sherman Act*

### *Section 1*

Section 1 of the Sherman Act makes illegal every contract or combination which unduly restrains interstate commerce. The restraint to which the act refers is something which impairs or restricts competition within a given market. That restraint is undue or unreasonable when it adversely affects or has the necessary tendency to adversely affect the public interest. It is usually not too difficult, once you have defined the market and familiarized yourself with its operation, to determine whether or not the activity under scrutiny is restrictive of free competition in that market. It is much more difficult to decide whether or not such restraint is unreasonable because of its adverse affect upon the public interest. A complete economic survey of the industry involved and even of competing industries may be required before this issue can be resolved.

Fortunately or unfortunately, as the case may be, the courts have relieved you of the necessity of determining what is an undue restraint in certain types of cases by the adoption of the *per se* rule. The general statement of the doctrine is that agreements between competitors to fix prices[2] or which substantially affect the price structure[3] are conclusively presumed to be unreasonable. The rule is said to be equally applicable to arrangements between competitors to limit produc-

1. 288 U. S. 344, 359-360.
2. *United States* v. *Trenton Potteries*, 273 U. S. 392.
3. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150.

tion, apportion markets,[4] boycott other traders or otherwise exclude competitors from a market.[5] I am not ready to concede that all agreements, the purpose or effect of which is to exclude competitors from a market, are unlawful *per se*. The broad generalization made by Mr. Justice Jackson in the *International Salt* case[6] that ". . . it is unreasonable *per se* to foreclose competitors from any substantial market" just "ain't necessarily so". Exclusive territorial dealership agreements, for instance, obviously exclude competitors from a market. Yet many such agreements are perfectly lawful.[7] The Supreme Court in the *Columbia Steel* case,[8] commenting on the *Yellow Cab* case, said that nothing in that decision ". . . supports the theory that all exclusive dealing arrangements are illegal *per se*". Indeed, where an exclusive dealership arrangement can be said to be reasonably necessary to protect the lawful business purposes of the parties and is not a part of an attempted monopolization or fixing of prices, it will generally be sustained. Requirements contracts by their terms exclude competitors from the buyers' market, yet it has never been held, to my knowledge, that such contracts are *per se* unlawful.

Even agreements between competitors to fix prices are not always conclusively presumed to be illegal. In *Board of Trade* v. *United States*,[9] the rule of the Board prohibiting purchases after the close of business at any price other than the closing bid was held not to offend Section 1 because the enforcement of the rule had no appreciable effect on general market prices or on volume. So, in *Appalachian Coals, Inc.* v. *United States*,[10] the agreement of the bituminous coal operators in the Appalachian district to sell their products through a common selling agent which fixed the price for all producers in the area was held lawful as not having an anti-competitive effect on the general market and as a justifiable device in a depressed market. In both cases the Supreme Court, in effect, applied the rule of reason indicating that even where price is the subject of agreement, the court may inquire (1) whether defendants have enough market power to make the restriction on price competition an undue restraint and (2) whether they are exercising that power or intend to do so.

The growth of the *per se* rule stems in large part from the understandable desire of the courts to avoid the vexations and difficulties incident to an examination and evaluation of economic facts. The courts are not well suited, so it is said, to undertake such determinations. Yet whether the restraint imposed by the challenged conduct is undue and, in fact, injures competition is the very inquiry which the court must make wherever the rule of reason has even limited application.

I wish that it were possible to lay down some formula by which you could readily determine whether a given restraint is so injurious to competition as to be undue and, therefore, within the purview of Section 1. It can at least be said that there must be a showing of actual or intended harm of a substantial character to competitors or customers. Generally, but not necessarily,[11] this harm is indicated by an effect upon the market prices of some commodity or commodities.

### *Section 2*

The definition of "monopolize" or "attempt to monopolize", forbidden by Section 2, has been clearly stated by the Supreme Court. It is the possession of or attempt to acquire power to control a market coupled with the intention to exercise that power.[12] The power to control has been generally stated to be the power to control market prices or exclude competitors. Obviously, that power must be exercised or exist within a defined market. What the relevant market is in a specific case has understandably given the courts much trouble. What are its geographic limits? What products comprise the competitive market? These questions must be answered before you can attempt to evaluate the power of any corporation or group of corporations to fix prices or exclude competitors. The appropriate market, the courts have said,[13] is the "area of effective competition" within which the defendant or defendants operate. It is a practical question to be answered by a survey of the area within which the defendant's goods actually compete with similar products. You will recall that in *United States* v. *Columbia Steel Co.*,[14] one of the most important of the later cases involving Section 2, the Court found the relevant market was different for each product affected by the merger of the steel companies there involved.

Naturally, as you narrow the geographic limits of the market, you tend to intensify the competitive position of the companies involved. Thus, in the *Farmers' Guide Publishing Co.* case,[15] the Supreme Court reversed the lower court which had adopted a national market for farm journal advertising because it found that the appropriate market was the eight states where the parties' newspapers principally circulated. And, in *United States* v. *Paramount Pictures*,[16] the Court narrowed the market from the exhibition of films in theaters generally to the exhibition in first-run theaters.

Equally important in defining a market are the products to be included within the competitive orbit. The decision of the Supreme Court in the *Cellophane* case[17] goes very far in clarifying that subject. There, the Court approved the inclusion within the relevant market in a Section 2 case of qualitatively distinct substitutes for cellophane shown to be reasonably interchangeable. This significant holding, which clearly recognizes the realities of present-day competition, substantially broadens the scope of market determination.

The market having been defined, your next step is to determine whether your client possesses such power in that market coupled with the requisite

4. *Addystone Pipe & Steel Co.* v. *United States*, 175 U. S. 211.
5. *Klors, Inc.* v. *Broadway-Hale Stores*, 27 U. S. Law Week 4253 (decided April 6, 1959); *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457; *International Salt Co.* v. *United States*, 332 U. S. 302.
6. 332 U. S. 392 at 396.
7. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 239 F. 2d 176; *Webster* v. *Packard Motor Car Co.*, 243 F. 2d 418.
8. *United States* v. *Columbia Steel Co.*, 344 U. S. 495 at 523.
9. 246 U. S. 231.
10. 288 U. S. 344.
11. *Klors, Inc.* v. *Broadway-Hale Stores*, *supra*.
12. *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Griffith*, 334 U. S. 100.
13. *Standard Oil of California* v. *United States*, 327 U. S. 293, 299.
14. 334 U. S. 495.
15. *Indiana Farmers' Guide Publ. Co.* v. *Prairie Farmer Publ. Co.*, 293 U. S. 268.
16. 334 U. S. 131.
17. *United States* v. *DuPont*, 351 U. S. 377; *cf. United States* v. *DuPont*, 353 U. S. 586 (the "General Motors" case).

intent to exercise the power as to make him subject to the charge of monopolizing. Of course, if actual control of prices or actual exclusion of competitors from the market is disclosed, there is no difficulty in finding both the power to control and the intent to exercise that power. The troublesome problem is where the charge is the existence of unexercised monopoly power. I wish it were possible to say that control of some definite percentage of an industry establishes the existence of the requisite market power. Judge Learned Hand, you may recall, said something to that effect in his famous dictum in the *Aluminum* case[18] when he stated that 90 per cent constitutes a monopoly, 60 or 65 per cent is doubtful, and 33 per cent is not enough. Judge Hand was speaking, of course, of an accomplished monopoly and not a charge of monopolizing, but, even so, it is clear that there is no single test by which the existence of a monopoly, still less the existence of unexercised monopoly power, may be determined. The best summation of the tests to be applied that I know of is contained in the *Columbia Steel* case where the Court said:[19]

> In determining what constitutes unreasonable restraint ... we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development in the industry, consumer demands, and other characteristics of the market.

In short, you must apply the rule of reason and, evaluating all the pertinent factors, determine whether the market control in question imposes an undue restraint upon competition, and whether an intention to impose that control upon the market is present. The intent, by the way, need not be a specific intent except in the case of a charge of attempt to monopolize, but may be established by showing that monopoly power was unlawfully acquired or was maintained by illegal practices or persistent design, that is, by abuse of power. To establish the requisite intent, it is necessary that there be proof, as the Court pointed out in the *Griffith case*,[20] that the defendant "has acquired or maintained his strategic position or sought to expand his monopoly or expanded it by means of those restraints of trade which are cognizable under Section 1".

So we come back in a Section 2 case to the same problem which we face in determining what constitutes an undue restraint of trade under Section 1—the existence of that degree of public injury which justifies characterizing the defendant's position as an unreasonable burden upon the competitive system.

There remains to be considered one issue common to most Section 1 and many Section 2 cases—what constitutes a conspiracy? The concept of conspiracy is one with which we are all familiar. It involves the meeting of the minds of two or more persons upon a common course of action. Few antitrust conspiracies are established by direct testimony of agreement. Reliance must be placed on inferences from proof of things done or said by the parties. The courts have gone very far in inferring agreement from uniformity of conduct where the parties with knowledge that a plan involved concerted action have given adherence to and participated in it. The *Interstate Circuit*,[21] *Masonite*[22] and *Cement Institute*[23] cases are illustrative of such holdings.

The Court of Appeals for the Seventh Circuit went too far, however, in the *Triangle Conduit* case[24] in holding that conspiracy was established merely by a showing of identical conduct by competitors each knowing what the other was doing. This doctrine of "conscious parallelism" was seized upon by the Federal Trade Commission as creating in effect a *per se* rule for the establishment of conspiracy. Fortunately, the Supreme Court laid this notion to rest in *Theatre Enterprise* v. *Paramount Film*,[25] saying:

> ... this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.

The test of agreement is whether in fact the parties did tacitly or expressly agree. Uniformity in prices and uniformity in terms of sale are frequently the result of competition rather than conspiracy. The market prices of most homogeneous basic products inevitably seeks a common level since the product of one producer cannot be sold for more than the product of his competitors. Moreover, discounts and other terms of sale are often the result of long established custom and practice in the industry and again competition generally compels uniformity. And, of course, each competitor, if he is a live competitor, knows the prices and terms of sale of his fellow competitors. There is no economic justification for the doctrine that uniform business behavior must stem from agreement and certainly no legal justification for adopting the theory of conscious uniformity as conclusive proof of conspiracy.

There is one class of conspiracies to violate the antitrust laws which I have great difficulty in reconciling with the decisions generally and with sound legal principles. I refer to so-called intra-corporate conspiracies. It seems to be settled law that a corporation and its officers acting on its behalf are not guilty of conspiring to restrain trade when they fix prices or otherwise set corporate policies.[26] But a different rule seems to apply where an agreement is between a parent and its subsidiary or between companies controlled by a common ownership.

It comes as a distinct shock to me, and I believe to most lawyers, to be told that an agreement between a parent company and its subsidiaries or between subsidiaries governing the future conduct of company business may constitute a conspiracy to restrain trade, although the same conduct by a company and its officers and agents is legal. Yet, in effect, that is what the Supreme Court of the United States held in 1951 in the *Kiefer-Stewart* case.[27] There it was held that the evidence warranted a finding that it was illegal to fix a maximum resale price for liquor sold by two distillers,

18. *U S* v. *Aluminum Co.*, 148 F. 2d 424.
19. 334 U. S. 108.
20. *U S* v. *Griffith*, 334 U. S. 108
21. *Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208.
22. *United States* v. *Masonite Corp.*, 316 U. S. 265.
23. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.
24. *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. 2d 175.
25. 346 U. S. 537
26. *Nelson Radio & Supply Co.* v. *Motorola*, 200 F. 2d 911, *cert. denied*, 345 U. S. 925; *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737
27. 340 U. S. 211.

one of which was a wholly owned subsidiary of the other. The case did not turn upon the ground that the fixing of resale prices was unlawful, but upon the agreement of the defendants to sell only to those wholesalers who observed the maximum resale price regulations. The Court admits that either defendant acting individually might have refused to deal with wholesalers who resold liquor at prices above the maximum, but said: ". . . the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers".

To me it is difficult to understand why something which a corporation may lawfully do by arrangement with its agents, employees or branch houses becomes illegal when a wholly owned subsidiary is involved. The fact that the two defendants in the *Kiefer-Stewart* case were handling different brands of whisky and held themselves out as competitors seems to have carried some weight with the Court, but the decision was rested squarely on the proposition that "common ownership and control does not liberate corporations from the impact of the antitrust laws".

The decision in *Kiefer-Stewart* was forecast by what the Supreme Court had decided in the earlier *Yellow Cab* case.[28] There, the corporate defendants were controlled but not solely owned by a single individual. The charge was a violation of both Sections 1 and 2, so that establishment of conspiracy was not essential to the validity of the complaint if the United States chose to rely on Section 2. However, the Court left no doubt as to its position on the subject of conspiracy, saying that unreasonable restraint ". . . may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent".

In one of the more recent decisions of the Supreme Court on this subject, *Timken Roller Bearing Co.* v. *United States*,[29] the Timken Company was charged with conspiring in violation of Section 1 with two foreign corporations in which Timken was a very substantial stockholder (50 per cent in one corporation and 30 per cent in the other) to divide world markets for anti-friction bearings. The majority of the Court again decided that ". . . common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."

Mr. Justice Jackson, in a dissenting opinion, put his finger upon what seems to me to be the fundamental fallacy in the rule announced in *Kiefer-Stewart*. After pointing out that Government counsel admitted that the Timken Company, acting through separate departments or agents, could lawfully have done everything that it was charged with conspiring with its subsidiaries to do, he said (page 606):

> The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons" and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels.

I agree. But we are faced with a condition and not a theory. How are you to advise your corporate clients with respect to the legitimate scope of their relationship with their subsidiaries?

It is difficult to define the limits of lawful agreements between parent companies and their subsidiaries because, as Mr. Justice Jackson points out, the doctrine of intra-corporate conspiracy defies logical analysis. In general, I should say that all normal intra-company arrangements are valid unless they are entered into for the purpose or have the necessary effect of unduly restraining the trade of those outside the corporate family. This, I appreciate, is a delightfully vague generalization, but it is the best I can do in applying decisions which, so far as they rest on the doctrine of intra-enterprise conspiracy, seem to me to be unsound.

28. *United States* v. *Yellow Cab Co.*, 332 U. S. 218.
29. 341 U. S. 593.

# The Selection of the Federal Judiciary:

# The Profession Is Neglecting Its Duty

by **Ben R. Miller** • *of the Louisiana Bar (Baton Rouge)*

**At least since the Civil War, Presidents have been choosing federal judges almost exclusively from the ranks of their own political party. It is to the great credit of the American legal profession that practically without exception, men appointed to the federal Bench for political reasons have put aside all partisan considerations once they donned the judicial robes. Mr. Miller points out, however, that the spectacle of partisan selection of judges must raise certain questions in the minds of the public and may eventually lead to doubt about the impartiality of our courts. It is the duty of the profession, he declares, to take a determined stand in favor of the selection of federal judges solely on the basis of ability and integrity.**

The organized Bar can engage in no more vital activities than those of defending the courts as an institution of our government, yet seeking constantly to cause them to fully justify the confidence of our people.

In the performance of its obligation of assisting the courts to maintain the confidence of the people, the organized Bar as well as the individual lawyer must of course have full freedom not only to criticize specific constitutional decisions of the courts but also to criticize the processes by which judges are selected.

The dual duties, seemingly contradictory, must be reconciled and both performed. Criticism should be constructive, reasoned and responsible and motivated by the highest of principles.

We know that mere words in defense of the courts, no matter how often or vigorously spoken by the organized Bar, will not alone cause our courts to command the public respect indispensable to the "rule of law".

The Preamble to our Canons of Professional Ethics recognizes this when it states "the stability of Courts . . . rests upon the approval of the people . . . [and] it is peculiarly essential that the system for establishing and dispensing Justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration".

Pretermitting the question of the validity of enforcement by federal troops of controversial and sweeping constitutional decisions, this enforcement method is of itself potentially destructive of our form of government; in addition, troops cannot secure real acceptance of judicial decrees in the hearts and minds of our people.

For judges to be considered and accepted as impartial and non-partisan or bipartisan arbiters of disputes and interpreters of law, the public must believe that these judges have been impartially chosen. Yet at the present, as well as for at least the last one hundred years, our federal judges have been chosen with political affiliations almost entirely that of the President making the appointment.

We as lawyers may understand that appointees on such a partisan and political basis can become impartial, non-partisan or bipartisan in the twinkling of an eye and upon the donning of their judicial robes. But the lay public cannot understand such a unique characteristic in the American lawyer newly made into a judge.

Every judge of every court—state and federal—knows that the Attorney General of the United States must pass upon the possibility of his promotion to or up the federal judiciary ladder. We as lawyers may agree this may not influence the decision of the judge in those cases in which the Attorney General appears as counsel. Yet one of the lines of the Lord's Prayer is "Lead us not into temptation".

We as lawyers may feel that men with long careers in agencies of the government can make impartial judges in litigation involving those agencies. This too the public, and even other lawyers, may find difficult to accept.

## *Judicial Selection . . . Some Questions*

Again, we may feel that filling federal judicial positions almost exclusively with men without prior judicial experience and often in their later years is not too unsound. But the lay public wonders why more promotions

—from the state judiciary as well as in the federal judiciary itself—would not be a wise principle of judicial selection, inasmuch as sound promotion systems are observed in all other phases of our life and industry; and why men should be first named to our courts and expected to learn a most difficult and very strenuous job at ages near those at which their "counterparts" in business and in industry are being retired.

And can even we as lawyers fail to recognize the danger to the courts as an institution if the Department of Justice continues to exercise such a dominant influence over the selection to, and promotion in, the courts before which it has become the chief litigant?

The facts cannot be disputed, though of course, conclusions may differ.

A résumé showing the practice of each Administration, be it Democratic or Republican, of appointing almost exclusively from its own party, going at *least* as far back as the Civil War, was contained in the report of the Federal Judiciary Committee of the American Bar Association to the House of Delegates in February, 1956.

Each President, at least since the Civil War to this very moment, has appointed federal judges almost entirely from members of his own political party, and ranging from a low of 82.2 per cent to a high of 98.7 per cent. Mr. Eisenhower's percentage is approximately 97 per cent.

When Cleveland became President in 1884, the Federal Judiciary was better than 95 per cent Republican. Not a single Democrat had been named to the Supreme Court since 1861. And it was not until the third term of Franklin D. Roosevelt that the Federal Bench was predominantly of the Democratic Party.

In most marked contrast to the historical partisan practices by both political parties in this country is the example of the late Earl Jowitt of England. While Lord Chancellor for six years he appointed eighty-one judges or about one third of all the judges of Britain, yet only two were drawn from his own political party.

Mr. Rogers, while Deputy Attorney General, in a speech at the Regional meeting in Denver in 1957, stated that at the beginning of the Eisenhower Administration "Over 80 per cent of the federal judges had been appointed during Democratic Administrations". It is also a fact, however, that at the beginning of the first Franklin Roosevelt Administration approximately 72 per cent of the judges had been appointed during Republican administrations. It appears clear from history that only a sufficient tenure in office is needed for such an imbalance to occur under either Republican or Democratic administrations.

If the practice is to be stopped, some President must do it. True, there has been and will be senatorial pressure, but each President in recent years, including Mr. Eisenhower, has had a Senate in which approximately half of the states have no senators from the President's own party to bring such pressure.

It was my privilege to have served almost nine years on the Federal Judiciary Committee of the American Bar Association—during the last three and one-half years of President Truman's Administration and the first five and one-half years of President Eisenhower's Administration. As incomplete as our data were on the political background of the various appointees, the active partisan background of most appointees under both administrations is rather clearly shown by these facts:

Appointments by Mr. Truman during that period include these:

One was a brother of a Democratic United States Senator.

One was a son of a Democratic United States Senator.

One had himself served an interim appointment as a Democratic United States Senator.

Two were former Democratic attorneys general of their state.

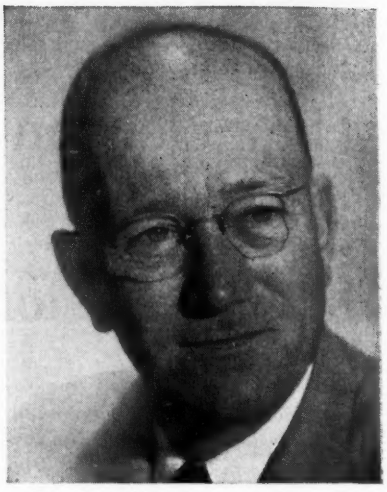
One was a former Democratic governor.

One had managed a Democratic governor's successful campaign.

Two had been delegates to the Democratic National Convention.

Six had been Democratic members of their state legislature.

Two others had occupied responsible Democratic party positions in their state.



**Ben R. Miller is a member of the House of Delegates of the Association and is a former member of the Association's Committee on the Federal Judiciary. He practices in Baton Rouge, Louisiana.**

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Similar appointments by Mr. Eisenhower included these:

One was a former Republican Senator.

One was the law partner of a Republican Senator.

One was the campaign partner of a Republican Senator.

One was a former Republican governor.

Four were former Republican Congressmen.

One was the law partner of a former chairman of the Republican National Committee.

One was at the time of his nomination, Republican National Committeeman.

One was a former member of the Republican National Committee.

Six were delegates to Republican National conventions.

Five were former Republican members of their state legislatures.

Three were campaign directors for, appointees to special positions by, an unsuccessful Republican nominee for president.

One was an unsuccessful Republican candidate for Congress and later for state attorney general.

One is the husband of a Republican National Committeewoman.

One was a Republican state chairman.

Two were Republican county chairmen.

### *Promoting Judges . . . The Appellate Courts*

Rare, indeed, was it during these nine years that appointees by either President Truman or President Eisenhower had prior judicial experience *in any court.* And as for promotions within the Federal Judiciary, data obtained about two years ago from the Administrative Office of the United States Courts show that of twenty-two appointments by President Eisenhower to appellate courts, *only seven* were from lower courts. Yet this was a slightly higher percentage than during President Roosevelt's Administrations, for of fifty-four such appointments to appellate courts only eighteen were from lower courts. It may surprise you to know that in this particular respect President Truman's record was fifteen such promotions out of a total of twenty-seven appellate court appointments.

The late and revered Arthur T. Vanderbilt, on December 5, 1956, wrote me that "The record which the appointing power has made in the Federal Government is far from what it should be and it will only improve as the appointing power is forced by the Bar to respect its opinion."

In a lecture he delivered February 23, 1956, Chief Justice Vanderbilt said this:

> . . . the decisions of a bipartisan court in cases involving political issues have much more weight with both the legal profession and with the public when they are unanimous or substantially so, than would be decisions of a court chosen exclusively or preponderately from one political party. Paradoxical though it may sound, a bipartisan judiciary is the only practical way in this country to achieve a non-partisan judiciary, and who would deny that all justice should be non-partisan?

The organized Bar must fulfill its obligation of protecting the courts as an institution of our Government. It can best do so, however, by vigilant and militant efforts to change the selection process for federal judges in such a manner as to cause our people to have full confidence in the impartiality and non- or bipartisanship of the judges so selected. Then and only then will our people accept and abide by their decisions.

It is understandable why lawyers hesitate to criticize processes by which the federal judges before whom they practice were selected. The reluctance to speak out against a prospective appointee not really meeting the high standards which should be observed is also understandable. Yet such are the duties our profession should courageously assume. But often and for far too long have we failed to be forthright and militant in facing up to these obligations.

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What are *the hallmarks of a good lawyer?* A lawyer's general reputation among his clients and fellow lawyers is a useful indication of his professional capabilities. The prospective client can perhaps discreetly discover the attitudes of other clients, and, while he may not be able to ask another lawyer for an appraisal of a candidate, there are factors which he can ascertain and evaluate:

- What other companies does the attorney, or his firm, represent?
- What standings and reputations do these companies have in their fields?
- To what extent is the candidate active in bar affairs?
- Does he or his firm have a relationship with a law school or bar group devoted to continuing education of lawyers?
- Has he ever participated in a forum or symposium conducted by such an organization?
- What status do the rating agencies assign to him or his firm?
- What training has he had, and what is his professional history?

—Lawrence A. Sullivan, *How To Choose and Use a Lawyer,* 35 HARV. BUS. REV. 62-63 (September-October, 1957).

# Administrative Law:

# Limited Pretrial Procedure

by Lloyd Buchanan • *of the District of Columbia Bar*

**Pretrial procedure has proved a great help in many courts in shortening trials, narrowing issues and encouraging settlements. Mr. Buchanan proposes the use of a limited form of pretrial in cases pending before administrative agencies, pointing out how pretrial can be adapted for use by such agencies.**

The work of Judge Alfred P. Murrah, as Chairman of the National Pretrial Committee, the late Chief Justice Arthur T. Vanderbilt and others in broadening the scope, enhancing the value and extending the use of pretrial procedure is well known. I would dwell briefly on a situation where such procedure is not generally established and where opportunity therefor is limited.

Whatever similarity between formal administrative and judicial hearings may be claimed or denied (sometimes recognized), the advantages which adhere to pretrial conferences in the latter are likewise present or available in the former. Administrative hearings involve complex and important issues. Should we deny to such proceedings, wilfully or through neglect, the advantages of application of pretrial procedure?

The procedure before some federal administrative agencies readily lends itself to pretrial conferences. Thus the Civil Aeronautics Board, with hearings focused, if not always held, in Washington, can without inconveniencing litigants call on attorneys to foregather for formal pretrial conferences. On the other hand, cases before the National Labor Relations Board are heard in various parts of the country; it would entail inordinate expense and delay to call the parties and the hearing examiner together before the time set for actual hearing.

Nevertheless, denied the opportunity provided by formal pretrial procedure, the hearing examiner can, with the cooperation of counsel, develop and follow an effective and important pretrial procedure. On occasion a lawyer will be uncooperative, this reflecting the merit or lack of merit in his case, possibly preconceived notions, his own personality, or a combination of these or other factors. On the other hand, however cooperative, lawyers are usually cautious and for that reason are sometimes reluctant or slow to limit issues and to stipulate facts.

National Labor Relations Board hearings, because they are so intensely litigated, provide a challenging, even difficult field and at the same time a useful and very interesting one. Beginning with examination of the formal pleadings, the hearing examiner can wonder and certainly inquire whether the apparent issues raised are in fact real issues. For example, there may be a denial or denial of information and belief concerning commerce or concerning the existence of a labor organization. Occasionally these indicate a substantial issue which, beyond the hearing itself, will be litigated before the Board and the courts. More often, however, the denial is but formal and there is no intent to contest the allegation.

Whether or not an apparent issue must be litigated can usually be ascertained by direct but friendly questions put to counsel by the hearing examiner. Many stipulations can thus be entered into, removing from the arena but not from the forum questions concerning which there is no dispute.

Here also, by citing elements involved but which are not in issue, one can direct the course which the evidence should follow. It is a truism that no proof is needed where no issue is raised. Yet counsel, having prepared to prove all the elements of his case, will undertake to do just that even where his position is not challenged and his proof is unnecessary. Opposing counsel, on the other hand, although he has admitted the element involved, will see here a challenge which he must take up and, by his experience and skill, attempt at least to weaken. Such efforts by counsel must be limited in the proper conduct of a hearing.

Insofar as admissions and stipulations are concerned, the hearing examiner should not attempt to compel action by counsel. Only the latter can know and declare that, where an issue

appears to exist, there is in fact no issue at all. Yet the hearing examiner may properly and should encourage stipulations where they are proper. This latter condition may appear to pose an insurmountable problem. But eschewing any attempt to limit counsel in the presentation and development of their case, the hearing examiner can accomplish much by questions put to counsel without attempting himself to answer those questions.

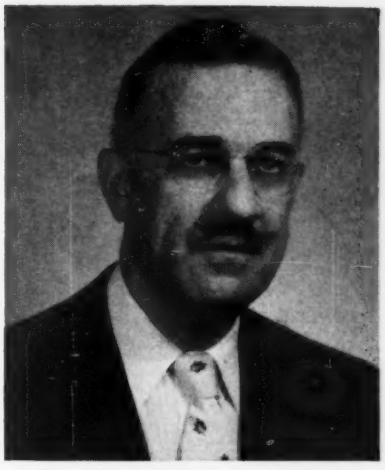
Whatever words are used in this connection, the technique calls first for the reminder to counsel that they are expected to cooperate in the interest of fair and expeditious procedure. They must then be assured that their right to litigate all issues is fully recognized where issues really exist and there is a need, perhaps little more than a desire, to litigate. If it be necessary to go beyond this, counsel can be advised that prolongation is not an end in itself and that obstacles should not be interposed merely in the hope that a windfall may develop. Yet, hardly faint-hearted, counsel may be reluctant or wary to the point of uncooperativeness.

Having said that compulsion should not be attempted, are we, the hearing examiner, litigants, and all other counsel, left to the tender mercies of a single recalcitrant attorney, whatever his motives or understanding? Fortunately, we are not. Whatever his general attitude on a given point may have been, the pretrial discussion has brought forward the specific question whether he proposes and is prepared to maintain, prove and test his position. Counsel knows whether or not he is thus prepared and whether he can make a show of maintaining that position. In my own experience, counsel has never stated that he intends thus to proceed when, as the development of the hearing will indicate, he was not prepared and did not intend to do so. Surely whatever his attitude, counsel will not want to expose himself to embarrassment which would be all too evident.

While not within the scope of pretrial procedure, a further litigational stenosis may here be mentioned because of its related object to limit the scope of the testimony. An issue may be fully created by an allegation and a general denial thereof submitted under the rule that an answer "shall specifically admit, deny, or explain each of the facts alleged in the complaint . . ."[1] Under this rule a respondent need not set forth or even mention an affirmative defense, however helpful it might be in limiting the proof and understanding the issues were such defense stated.

Thus, for example, to an allegation that employees were discriminatorily discharged because of their union activities, an employer may merely say, " 'Tain't so!" Conceivably the employer may defend on various grounds, among them that the employees quit of their own volition; that they were discharged for inefficiency or any other of a host of reasons which come under the heading of just cause; or that the discharges were due to economic and nondiscriminatory causes. A pretrial query in this connection may elicit no more than a statement that counsel stands on his general denial. Yet here, as in a host of other situations which arise during a hearing and which threaten prolongation and delay and needless lengthening of the record, the hearing examiner is not without recourse. Seeking the facts, he is not limited to the role of spectator in a battle of wits between counsel. In the instance cited, when counsel for the respondent attempts to cross-examine a witness on such matters as would refer to his voluntary quitting or inefficiency, the question of materiality can be put to counsel. At that point he must disclose his defense or desist from such questioning, whatever he may later show.

In this last, as in the "host of other situations" to which I have referred, the hearing examiner like the judge can and must properly perform his functions in the conduct of a hearing. It is not the purpose of this article to consider such other situations. But it is relevant and it may be of interest to cite instances of questions which I have asked during necessarily limited pretrial discussions within the one-year period immediately preceding the preparation of this article. These are cited in inverse order as they occurred, and without any attempt to assess relative importance.



**Lloyd Buchanan was admitted to the New York Bar in 1929. Domiciled in California, he is now a trial examiner with the National Labor Relations Board in Washington, D.C.**

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1. Can counsel stipulate concerning the status, as supervisors or rank and file employees, of various persons named in the pleadings?

2. Is there a real issue concerning the appropriateness of the unit alleged for collective bargaining?

3. Are failure and refusal to reinstate denied, or is the denial only that these have occurred "at all times since the layoff"?

4. To what extent, in view of an earlier finding of discrimination because of discontinuance of overtime, is the respondent employer willing to modify its denial that it discriminated because of its continued failure to assign overtime work?

5. What is the basis for alleging that restraint of a supervisor is a violation of the Labor Management Relations Act?

6. Is a certain allegation of purpose necessary? (If it be superfluous, no testimony will be received concerning it.)

7. What specific distinction do the respondents, union and union representatives, intend when they deny an allegation concerning strike activities but admit that they engaged in the strike?

1. National Labor Relations Board Rules and Regulations, Series 7, as amended, §102.20.

8. Are the allegations of labor organization and discharge really in issue, or are the denials only formal and perfunctory? (In one case, unlike many others, both of these issues had to be proved.)

9. Where agreements referred to are lengthy, will counsel indicate the portions that are material to the issues before us?

10. Just what are the issues? (The answer in this case was inartistic, to say the least, and reflected a confusion of the complaint with the original charge. Permission was granted to amend the answer.)

11. Beyond certain stipulated facts, is the record of a prior proceeding in issue and must the trial examiner examine that entire record?

12. Where the answer admits that a "substantial number" of employees was laid off, is there any issue concerning the number and identity of those employees?

13. Are the commerce facts as alleged and the question whether the employer is engaged in interstate commerce really in issue?

14. What are the facts concerning existence of various contracts which are differently referred to in the charge, the complaint, and the answer? Can counsel stipulate concerning such facts?[2]

It is clear that whatever the extent and results of pretrial investigation and negotiation, and these vary widely, the need generally exists, before testimony is received, to define and limit the issues to be tried. It is equally clear that pretrial procedure should be adopted to save time and to enable concentration on the issues without or with less divagation to non-essentials.

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2. I would further cite in this connection two cases heard since the above list was prepared. In the first of these there were numerous preliminary motions, including a motion to dismiss on six different and detailed grounds. These motions were made and ruled on when the case opened for hearing. Stipulations were then prepared and noted concerning the nature of the work and the extent thereof. With a brief statement of position by the General Counsel, which limited the issues and satisfied the respondent's counsel that the defense could be narrowed considerably, we were ready for the first witness at 3 P.M. Although there was no proceeding which bore the label of prehearing conference, all of this in effect was such a conference, and the matters covered at that time together with other stipulations subsequently entered into would have been properly included in a prehearing conference had one been formally scheduled. Needless to say the hearing was materially shortened by the cooperation of counsel and the elimination of considerable testimony.

In the second case it quickly became evident that one party was relying on certain records and that other related data, not then available in usable form, were needed. Although the hearing was short, examination was postponed while records were examined and summarized for submission at the hearing. This work, including the agreement to summarize the material for our use, could and should properly have beeen made the subject of inquiry before the hearing opened; it would have been covered by a prehearing conference. In this instance, while it would have been indicated in a preliminary conference, the relevance of and need for records did not become apparent to me until several witnesses had testified.

## The President's Page

*(Continued from page 422)*

### *The Conference of the Inter-American Bar Association*

The eleventh biennial conference of the Inter-American Bar Association was held at Miami, Florida, during the week of April 12 to 19. The Florida Bar, the University of Miami and the Dade County Bar Association were hosts for the Conference. Our past President, Cody Fowler, of Tampa, presided over the meetings as President of the Inter-American Bar Association. Arrangements for the meeting were under the direction of William Roy Vallance of Washington, D. C., the long-time Secretary-General of the Association.

The following American countries were represented by delegates of their established bar organizations: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Equador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela, and the United States. The largest delegation was from Argentina which arrived in two chartered airplanes. It was composed of some eighty delegates, plus members of their families. No official delegation attended from Cuba, but two Cuban lawyers arrived during the course of the meeting and distributed a statement seeking to justify the revolutionary trials of the Castro regime in Cuba.

It was only possible for me to attend the opening session of the Conference, which I addressed, and the closing banquet. I did have an opportunity to talk to a number of the delegates personally. I am much impressed by the value of this organization, both to the legal profession and to the solidarity of the Western Hemisphere. I should like to urge membership and participation in the Inter-American Bar Association by more of our members. Those interested should contact the Secretary-General, William Roy Vallance.

The next Conference will be held at Bogota, Colombia. Dr. Mauricio MacKenzie, of Bogota, is the new President.

# Comparative Law:

# The Law Courts of Scotland

by S. G. Kermack, C.B.E. • *Sheriff Substitute of Argyll*

**In this interesting account of the structure and functions of the law courts of Scotland, the author brings out several points that will probably surprise American readers. Most lawyers in the United States are aware of the fact that Scotland has its own system of law, but few of us know just how different Scottish law is from English law, and no doubt even fewer have any information at all about the organization of courts in Scotland. And the citizens of Dodge City and Laramie may be somewhat surprised to learn what the word "sheriff" means in Edinburgh.**

Those members of the American Bar Association, many no doubt with Scottish affiliations, who took the opportunity after the London proceedings of visiting Scotland and meeting the Scottish Bench and legal profession in Edinburgh may have learnt something of the relations and differences of England and Scotland in the legal sphere. They may, however, care to have a sketch of the individual position of the Scottish legal establishment and its legal system. Indeed they, and also those who did not take the trip north, may have been intrigued by the existence of such a system at all. Knowing that the Sovereign, the Parliament and the Government of both countries are one and the same, they may have been surprised to find that the legal administrations are completely distinct. If they imagined that the relationship between them was something after the nature of the federal and state systems of their own country, they would find that they were mistaken.

The explanation is primarily historical and a matter of constitutional law, but it is a position which is just as much prized today as when it was instituted and which no one would seek to change. It rests of course on the union which took place in 1707, two and a half centuries ago. It is not the purpose of this article to deal with the effect as regards the legislative or the administrative fields, but it is to confine itself, as far as possible, to the question of the judiciary, for these other questions would lead too far afield.

It is important, however, to notice that Scots law is as distinct from English law now as it was in its origin. Much assimilation has naturally taken place by legislation and also by the unlikelihood of different answers being right to the same questions. This is particularly so as regards tort (in Scotland "reparation") and in contract. Even in these fields there are considerable differences. The English doctrine of consideration in contract, for instance, is entirely absent from Scots law. On the other hand, in family law, land law, succession, criminal law, trusts and naturally procedure, except to the very limited extent that they have been assimilated by statute, Scots and English law do not correspond and give each other little assistance.

With this very summary and perhaps misleading generalization, one can turn to the judicial organization itself, remembering that the difference of that organization is the symbol of the difference of the law. To anyone who wishes to pursue the general question, a paper read by Professor T. B. Smith, Professor of Civil Law at Edinburgh University, entitled "The Union of 1707 as Fundamental Law" and republished in *Public Law*, Summer, 1957, is recommended.

The definitive provision on the exclusive rights of the Scottish courts as part of the constitutional law of Great Britain is Article 19 of the Treaty of Union. It provides for maintenance and preservation of the courts of Scotland with the full authority which they have always claimed and exercised and enacts that no cause in Scotland shall be cognizable by the Courts of Chancery, Queen's Bench, Common Pleas or any other courts in Westminster Hall and that the said courts or any others of the like nature, after the Union, shall have no power to cognize or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same.

The unlikelihood of Scottish courts attempting a corresponding inroad on the jurisdiction of English courts no

doubt accounts for the provision being one-sided. As Professor Smith points out, "such an incorporating Union, maintaining complete severalty of administration of justice, may well be unique".

It is not therefore surprising that though the courts of Scotland have altered in many respects since the union of 1707, the main structure remains the same, as indeed that article provided. Its development has been often different from that of England. There is however, one resemblance. This is the centralized nature of the Supreme Court, which is maintained entirely in the capital, Edinburgh, just as the Supreme Court in England is in London. There are no courts of first instance forming part of the Supreme Court in other centers, as is the case often in America and in most Continental countries, and only the Criminal Court goes on circuit to other cities. The primary reason is again historical and is no doubt contributed to by the small size of the population, about five million, approximately the same number for instance as there are in the State of New Jersey. It does, however, present the anomaly that the main commercial center and the largest city is Glasgow, with a population of a million.

### *Courts in Scotland . . . An Over-All Picture*

It is perhaps better to give first an over-all picture of what courts function in Scotland before dealing with them in greater detail. It should be noticed that a somewhat greater proportion of the work is done by professional judges than in England. Thus in addition to the Supreme Court, there is the Sheriff Court, also staffed with professional lawyers. It does much of the criminal work which is done in England by benches of lay magistrates, and it has, incidentally, a much wider jurisdiction in civil cases than is given to the County Court Judges, though also professionally barristers, who stand in somewhat the same relationship in England as regards civil matters. There are, however, lay judges, Justices of the Peace and Police Magistrates, who deal with minor criminal charges but to a less degree and with a more limited jurisdiction.

At this stage it should be emphasized that as regards lower courts, jurisdiction is what has been given them by statute or to a certain extent by custom, while the Court of Session was the King's Court, which for that reason, had an over-riding jurisdiction and originally was only limited by his power or desire to regulate the administration of justice, a situation less likely to be created in later periods when logical reasons were sought for the setting out of a system of courts or when revolutionary movements, as in France, led to similar results.

The High Court in England and the Court of Session in Scotland have therefore an air of prestige and predominance over other courts in these countries, rather than being the apex of a systematic set-up of otherwise equally important courts. They do not really correspond to the Supreme Court of the United States, which owes its prestige to other factors, principally in our eyes, to its position in the Constitution. It seems that the United States, inheriting as it did the English idea, has to a large extent succeeded in changing from the original viewpoint to the newer. In the older countries, this has not taken place to anything like the same extent.

As a consequence the Supreme Court first demands attention. If it be asked if it has both civil and criminal jurisdiction, the answer is that it has and that the same judges deal with both, but as theoretically an entirely different court. The civil court is the Court of Session; the criminal court is the High Court of Justiciary. The Court of Session is headed by the Lord President; the High Court of Justiciary by the Lord Justice General, who is the same person. Each court consists in addition of fourteen judges.

The Court of Session is both a court of first instance and an appeal court. Seven of its members sit individually to try cases in first instance, known as Lords Ordinary, and collectively as the Outer House. The other eight, the senior ones, are formed into two divisions, the First and Second Division of the Inner House with permanent presidents. These presidents are, however, appointed direct and not by seniority, usually from being Lord Advocate, the political and executive head of legal affairs in the Government, resembling the Attorney General in England and America. The two divisions are equal in status and the work is distributed between them. There is nothing to prevent any of the judges sitting in any capacity but though judges of the Divisions occasionally sit in first instance to help congested dockets, this is not very common. In any event, three judges are a quorum for a Division. They hear appeals not only from the Outer House but from the Sheriff Court and other courts as well.

In old days the Court of Session was accustomed to sit all together and perhaps a bench of fifteen judges is a little difficult to visualize. It is, however, possibly a consequence of this that it retains the power which it exercises on occasion to use a procedure analogous to what the French would call sitting *toutes chambres réunies*. Thus a case may be referred to a bench of seven judges or to the whole Court. This has a consequence of considerable use, for so sitting it can overrule a precedent in one Division in the past. This power, though not very often exercised, is a useful incursion on the principle that a court is bound by its own decisions.

The Court of Session has universal civil jurisdiction in all matters of civil right over the value of £50, but, as will be seen, concurrently in most cases with the Sheriff Court. The curious position results that it is for the party suing ("pursuer" instead of the English and American "plaintiff") to choose whether he will bring his action in the Court of Session in Edinburgh or in the Sheriff Court of the county where the defender is subject to suit and where, of course, expenses are lower. In fact the great majority of actions are brought in the Sheriff Court. There is the exception, however, that where a pursuer wants and is able to have his case tried by a jury, he gets his action transferred to the Court of Session because the possibility of jury trial in the Sheriff Court is very restricted. Jury trial in civil cases, which was introduced in the 1820's on an English model, has in recent years

been greatly limited in England, but is still much in use in Scotland because by statute, pursuers are entitled to insist on it. There have been proposals to limit their rights to do so.

Exclusive jurisdiction in divorce and nullity cases is retained in the Court of Session.

There is one other feature of the Court of Session which has always distinguished it from the High Court in England. There was never any separate Court of Chancery which administered equity. The Court of Session has always claimed to administer equitable doctrines and remedies, and thereby has avoided the anomalies of the division between law and equity. It always claimed to combine the two by virtue of its *nobile officium*. Naturally the question of whether it is administering the one or the other at any particular moment remains somewhat vague but it results that certain spheres of decision, particularly as regards trusts, can only be applied for here, as no other court has *nobile officium*, although the Sheriff Court is admitted to have some of the other equitable remedies. Thereby another type of exclusive jurisdiction arises in the Court of Session. As an example might be given the power to reform the purposes of a charity when necessary (*cy pres*).

In spite of the Court of Session being the Supreme Court of Scotland and of her retention of her legal system, there is none the less an appeal from it to the House of Lords in London, not of course, to the whole house, but to its judicial component. This was established soon after the Union by analogy. But the appeal is on Scots law alone. It is unnecessary to discuss whether the English judges, of whom exclusively the House of Lords was for long composed, were ideally fitted to administer a system of law in which they were not trained or whether their decisions were sometimes colored by the system which they did know. The modern judicial House of Lords by law contains certain Scots judges and the chance of its diverging from Scots law in cases from Scotland is now minimal.

The High Court of Justiciary is, as has been pointed out, the supreme criminal court and is entirely separate from the Court of Session, though identical in the personnel of the judges. Its status is also protected by the Treaty of Union. In many countries, the view is taken that civil and criminal judges should be entirely different, but Scotland, even more than England, has taken the opposite stand-point. On the other hand, she is to be classed among those countries who hold that prosecution of crime should be in the hands of the Crown or State, and this has long been the position of affairs. Private prosecution of crime is unknown in practice and almost in theory. This is a distinction from England where the Director of Public Prosecutions is a much more recent institution with far from universal scope. Public prosecution is, of course, a recognized feature of continental European countries and this is one of the similarities to them which Scotland has retained from past association with them. This is in distinction to the medieval picture of the judge presiding over parties who had challenged each other and dispute before him. There is a Crown Office which is responsible for controlling the bringing and conduct of prosecutions. It is under the Crown Law Officers, the Lord Advocate and his second, the Solicitor General, with four Crown counsel who actually conduct prosecutions before the High Court, and a complete service, the Procurators Fiscal, who conduct prosecutions in the Sheriff Court. It is they who decide whether a prosecution is to be brought and before what court and what steps are to be taken. There is no suggestion naturally that they should act in any other spirit than one of fairness and justice.

It will be noticed that this introduces a great distinction both from English practice and from Continental models. There is no enquiry in public before a magistrate or bench of magistrates who decide to commit or not to commit a man for trial. On the other hand, the prosecutor does not conduct his private enquiry in collaboration with an official (*juge d'instruction* in France) and under his direction. The prosecutor has a comparatively free hand, subject to getting advice from his superiors. There is no suggestion that the working of the system is in any way arbitrary. It is a testimonial both to the system itself and to its administration, in spite of the existence of a different system across the Border, that everyone seems perfectly satisfied with it.

Certain crimes—murder, treason, rape—are exclusive to the High Court, but a considerable number of other crimes according to their seriousness are in fact sent to the High Court by the Lord Advocate and others may be remitted either on plea of guilty or after trial for sentence, by the Sheriff to the High Court, if he considers the sentence he can award is insufficient in the particular case.

The members of the High Court also sit as an appeal court in criminal matters as the Court of Criminal Appeal. To it are taken appeals from convictions by juries sitting either in the High Court itself or in the Sheriff court. It also sits in a different capacity to hear appeals on points of law from decisions of summary criminal courts such as the Sheriff's Summary Court.

The High Court is final in criminal appeals and there is no appeal to the House of Lords as in civil cases and as is possible in criminal cases in England.

The Sheriff Court to which we now come is an interesting case of development. The Sheriff was originally a royal official both in England and Scotland who had a variety of duties on the King's behalf. It is only in Scotland, however, that he remains an essential part of the judicial machinery. Juvenile delinquents have been known to compare him unfavorably with the quite different type of sheriff with whom they are much more familiar in Wild West films! By the nineteenth century the sheriffs were members of the Bar who were part-time judges in the different counties. Sir Walter Scott, for instance, was Sheriff of Selkirkshire. The sheriffs, not being continuously resident in their sheriffdoms, deputed powers to local practitioners who were on the spot and they came to be known as sheriffs-substitute. Eventually the Crown took over the appointing of these as well, and it is they who now form the resi-

dent courts in the county. Most of them have been appointed from the Bar, though a few have been solicitors. There are nearly fifty of them, and they form a general series of first instance courts, dealing with the bulk of civil and a large proportion of criminal cases. Small wonder if they regard their nomenclature of "substitute" as liable to misconstruction, particularly outside legal circles! The sheriffs, sometimes known as sheriffs principal, now diminished in numbers, can hear appeals in civil matters from the sheriff substitute and two of them, Edinburgh and Glasgow, are full time appointments. The first instance courts are the sheriffs substitute and are in practice alluded to as sheriffs, as which they will be spoken of here.

Owing to the thinly populated nature of the country except the central industrial belt and part of the east, and to the difficulty of communications, the sheriffs vary greatly in the amount of work they have to do and accordingly are not all on the same salary basis. Nine sheriffs in Glasgow get through a great quantity of work and one in an outlying county may find time on his hands for other activities, but the ideal is achieved of having a universal professional court service available.

The sheriff has civil jurisdiction, unlimited in amount, subject to the restrictions mentioned above. Although there is no upward limit, mention should be made of the fact that cases below the value of £20 come before the Sheriff Small Debt Court, the procedure in which is summary with the minimum of written pleadings. It deals with a large number of cases and prevents the poor litigant from being mulcted in heavy expenses.

Appeal lies from the sheriff (except in small debt cases) alternatively and cumulatively, to the sheriff principal and to the Inner House of the Court of Session. The former is an appeal from a judge to another single judge, an anomalous arrangement, which no one would nowadays have invented *ab initio*.

The sheriff's criminal jurisdiction is also very wide. Cases are divided into those tried on indictment with a jury and summary cases tried on complaint by the sheriff sitting alone. The indictment cases, it has been pointed out, are all those which the Lord Advocate considers are insufficiently grave to be sent to the High Court and the maximum punishment which can be awarded is two years' imprisonment. The summary cases, besides the vast number of statutory contraventions, are those not serious enough to be put on indictment, and the maximum sentence that can be awarded for a first offence at any rate, is three months' imprisonment. It will be noted that there is nothing corresponding to the English system which gives the accused the option of being tried by jury instead of by an individual judge.

The indictment cases are subject to an appeal to the Court of Criminal Appeal but the summary cases can only be appealed on points of law and by case stated by the sheriff.

The minor cases competent before the courts of lay magistrates, already mentioned, are treated in the same way as other summary cases. Their powers of punishment are lower than the sheriff's.

It would be misleading to omit mentioning that the bodies of pleaders before the courts correspond to those in England and not to those in the United States. There is the "Bar", called "Advocates", parallel to barristers in England, who form an exclusive professional body. They do not deal directly with the client but are instructed by the solicitor branch of the profession. They alone can appear before the higher courts and do appear frequently in the Sheriff Court. In these lower courts, however, most of the pleading is done by the solicitor branch.

It will help to visualize the work of a country's courts if some sort of estimate of the amount of work they perform is given, even in a rough and ready way, for it enables anyone to arrive at a sort of comparison with his own state dockets, making allowances for the different structure of their own courts. The Inner House of the Court of Session in 1957 had 224 appeals and 221 petition applications, making 445 in all. The twelve sheriffs principal heard 230 appeals. This is almost exactly, for instance, the same number as in the appeal courts of the State of New Jersey as shown by the Annual Report of the Administrative Director, 1953-54. The Outer House of the Court of Session had 5500 actions and 1083 petitions, making 6583. The Sheriff Ordinary Court had 23,532 and the Sheriff Small Debt Court 91,821, making 115,353. The lay Courts tried some 2,800 small debt cases. The grand total of civil cases, therefore, was 125,737. In New Jersey the trial courts had 20,202 and the county district courts 134,103, making 154,305 in all. Presumably in each instance a relatively small proportion meant a handed-down or delivered opinion. It may be in America that the courts are not used as the sort of maids of all work like the Sheriff Court, which in addition dealt with some 55,000 miscellaneous applications, ranging from exemptions from dog licenses to legalizing adoption of children.

When criminal work is turned to, New Jersey seems to have it, for some reason or another. They had 10,145 cases on indictment and 894,946 cases in the Municipal Courts. In Scotland the High Court tried 154 persons and the Sheriff Court 1389 on indictment. The Summary Courts tried 137,606, but these included, for instance, 5000 for house-breaking and 11,000 for theft, who in America perhaps might have been on indictment, and only some 40,000 for Road Act offenses. Even with the Scottish tendency towards professional judges, the lay magistrate (plus one stipendiary magistrate in Glasgow) tried three fifths of the criminal cases, though only two fifths of those, such as minor thefts, which are technically crimes.

The professional judges consist of fifteen High Court Judges, twelve Sheriffs Principal (ten part-time only) and forty-nine Sheriffs Substitute making seventy-six (sixty-six full-time). This is not unlike the eighty full-time judges in New Jersey.

The differences in legal set-up in different countries are always interesting and it will be seen that Scotland has some distinctive features which American lawyers may find worthy of note, but we may feel by and large that the legal institutions of free countries tend to run along similar lines.

# New Problems for the Profession:

# What Will the Law Be Like in the Atomic Age?

by Eli Baer • *of the Maryland Bar (Baltimore)*

**Just as the Industrial Revolution created a host of new problems that were unknown to the agrarian society of the Middle Ages in which the common law was developed, so the Atomic Age will bring forth litigation calling for legal concepts different from those to which we are accustomed. With this thesis, Mr. Baer examines some of the legal situations that are bound to arise when atomic power comes into common use.**

Suppose you lived next door to a plant experimenting with atomic energy, which suddenly found its reactor out of control!

This near catastrophe actually happened in Canada just a few years ago. The plant had to send a hurry call to American engineers for help.

If you did live next door to such a plant, what—under existing law—could you do to protect yourself? Would you run to the zoning board? The city planning commission? The city hall? The city council? Or would you apply for additional insurance coverage?

Admittedly, the development of atomic energy processes is still in the experimental stage, and the reactive process has not fully been controlled to the point of absolute safety. In a new field such as this, fraught with all of its unknown dangers, insurance companies might very well hesitate to take the risk or, if they did take it, would do so at a prohibitive cost.

Therefore, a question to which lawyers, insurance men, and all businessmen alike should give some thought is, "What will the law be like in the atomic age?"

Just as conceptions of law changed when the automobile replaced the horse and buggy, the atomic age will also change the entire concept of existing legal principles in the light of new and radically changed conditions; and just as the industrial revolution brought with it many changes in employer-employee thinking and relations, there is now posed the question of what will happen when American business truly takes hold of atomic energy as a source for power, and what the law will be like under these new and changed conditions.

The magnitude of the question is emphasized when we realize that more than $200 million of "smart" money has been invested in atomic power plants, and that as a result of the Atomic Energy Act of 1954, Congress has authorized private industry, under certain conditions and regulations, to explore this new field of activity.

Moving into high gear without delay, many regulations and administrative orders have constantly been issued from such offices as the Atomic Energy Commission and the Securities and Exchange Commission. Recently the Atomic Energy Commission has started to grant applications for manufacture of electricity by small atomic plants. Also, Russia has just permitted newsmen of other countries to view its recently unveiled atomic energy electric plant.

Needless to say, the Atomic Energy Commission is greatly interested in the problem, because in that Commission has been reposed the duty and responsibility of seeing to it that experimentation in the use of atomic energy is channeled into the most useful and reliable enterprises bearing the closest scrutiny; and the Securities and Exchange Commission is also greatly interested in this situation because of its desire that the investing public be not subjected to the vagaries of reckless investment or exploitation by those who would issue stock in companies which have not proved themselves, or have not the type of fiscal protection by regulation and policing which investors should demand in a revolutionary field—such as that of atomic energy.

Businessmen will recall the wave of lawsuits which occurred when radium was first introduced commercially, and many insurance companies certainly will recall the tremendous number of claims which were presented by people who claimed injuries from poisoning through the radium used in watch dials.

Employers and employees will certainly be interested in the changes

**Eli Baer is now in private practice in Baltimore and Washington after many years' experience in the federal service. He is a former Principal Claims Attorney and Acting Assistant General Counsel to the Comptroller General. He has written and lectured on taxation, government contracts and procurement.**

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which conceivably will occur in the atomic age in cases involving the right to claim Workmen's Compensation for injuries in the course of employment, and it should suffice if reference is merely made to the time limits of the various states prescribing the time within which such claims may be filed before being barred by pertinent statutes of limitation.

Specifically, when it is considered that first signs of irradiation poisoning arose in Hiroshima as late as ten years after the bomb was dropped, we can well understand how outmoded would be our pertinent state statutes of limitations which, in most cases, bar claims unless notice of injury is filed within thirty days, and formal claims filed within three years from the date of the happening of the "act"; and, since statutes of limitations in this type of case are jurisdictional, employees would have lost their rights even before they realized they had any. Surely, this poses a legislative problem for wide-awake lawmakers.

Manufacturers of atomic energy plants might also consider the scope of their liability in the event, for example, they build a heating plant, sell it to a dealer who in turn sells it to a contractor, who installs the plant in a factory or in a home, and then the plant explodes.

Who will be responsible—the manufacturer, the dealer, the contractor, or will the loss fall on the home or factory owner? And that question is not farfetched, because of similar questions which have arisen in such seemingly innocuous situations—as where a person buys a bottle of soft drink which he opens, only to have the expanded gases in the bottle blow up in his face.

Now, let us carry our example a step further: Suppose the injured party desires to file suit. What are his chances of recovery? First, he must prove negligence and then he must accurately place the blame. That is where the claimant will encounter the first great hurdle. How will he prove his claim without "expert" testimony? Who are considered experts in this field within the present rules of court? Will the requirements of the federal act permit the "expert" to testify?

Needless to say, atomic energy is a highly secretive and sensitive process which the Government zealously guards. Therefore, it might well be expected that the Government would consider atomic energy processes top secret information, and refuse to allow experts to testify in court—for fear that the security of this country might be imperiled.

Thus, how will the courts rule when faced with the Government's objection to secret atomic energy processes being introduced in evidence; and, under such circumstances, will the law permit an administrative official in Washington (whom you never heard of or who never heard of you) effectively to overrule or nullify a judge sitting in the actual trial of the case? Of course, if the court refuses to allow the introduction of such evidence, the defendant will be most happy; but, on the other hand, the plaintiff will complain that he has been deprived of his right to due process of law under the Fifth Amendment to the Constitution, and scream, "I wuz robbed!"

Certainly, you might say, "Well, why can't the manufacturer place a notice on his product, saying—'Use with Care —Manufacturer Assumes No Responsibility'?" However, as a matter of law, can a manufacturer relieve himself of liability when producing a potentially dangerous article? Or, as a practical matter, wouldn't such admonition placed on the article restrict sales to a minimum, and be like waving a red flag at potential customers?

In any event, as a matter of law, the same situation might apply, as in the case of manufacturers or retailers of such everyday articles as anti-perspirants, shoe polish, DDT, or detergents, which some claim may prove harmful either by manual contact or inhalation; notices on the containers of such products have never stopped people from filing lawsuits for injuries or allergies sustained by their use, and some claimants have even recovered damages in those cases. Therefore, if the courts apply existing rules strictly to atomic energy processes, it conceivably could retard development and exploitation of this new source of power in the public good for many years.

Then, too, what rights will be acquired by those who discover or invent new processes or uses for atomic energy?

May such invention form the basis for creating a monopoly of the product, and how will the courts apply the provisions of the present anti-trust laws, as regards this new industry? Or may the Government exercise its sovereignty over such matters and claim them to be within the public domain?

In the latter event, how will the courts apply and construe the "due process clause"?

Also, since atomic energy is considered "restricted" information by the Government, will the law require that all employees of companies working in that field be subjected to the severest of loyalty tests in the national interest, even down to the janitor or handyman who sweeps the pavement in front of the plant?

If such tests are required by the law, it would certainly be reasonable to assume that a proportion of those subjected thereto would raise a great hue

and cry regarding the abridgment of their rights to freedom of thought and privacy under the Bill of Rights.

Then, there is the problem of controlling sewage. How will the law deal with these atomic wastes? If sent through the public sewers, pipes might dissolve or rapidly deteriorate, causing sewage to back up into your house, contaminating food, clothing, furniture and everything else in your home. In such instances, what protection would you have under present laws? How can atomic wastes and residues be safely disposed of? This poses a question for sanitary commissions, as well as for governors, mayors and legislative councils.

Also, suppose atomic wastes and residues are allowed to be dumped into the rivers, bays and oceans. What laws are there which will adequately prevent such dumping, particularly when research in the subject has disclosed that such disposal may be extremely dangerous to fish and plant life because of an atomic waste material called radioactive strontium?

Further, the trade journals are suggesting that the engines of automobiles, airplanes, ships, lifts, bulldozers and tractors might be powered by atomic energy in the not-too-distant future. What liability, therefore, would there be under present law if, for example, a reactive process in one of those engines "burns up", causing an explosion? What relief would present laws afford injured parties, and how far would the courts permit claimants to go in presentation of their proof of negligence?

Let us also consider the suggestion that atomic energy may be used for blasting purposes. That use would conceivably pose a greater problem than that which was presented when Nobel first introduced dynamite. Surprisingly, under present law, courts have decided that blasting with dynamite is not an inherently dangerous process, and that contractors using such blasting material are not insurers and are not charged with the duty to exercise the highest degree of care in the use thereof, when done by experts. However, what degree of care will the law require in the use of this new medium?

Railroads and trucking companies would also be beset by legal problems in the atomic era. What would the legal responsibility be if they transported atomic materials which ruined other freight? And would the lawsuit be governed by local law or federal law under the Interstate Commerce Act?

What about the legal liability of doctors who conceivably might use isotopes in the treatment of various skin diseases or cancer? Or, for that matter, what about the legal liability of pharmacists and chemical laboratories which process and compound the formulae?

Certainly all remember the recent, almost-disastrous situation involving the manufacture of a quantity of the new but now famous Salk polio vaccine.

Or suppose you are in the construction business, and are bidding on the building of a structure housing atomic energy elements? What laws will you have to comply with to adequately protect the public's interest? And how long will your liability last? Also, will the present Wage and Hour Law apply to you? How about the Taft-Hartley Act? What wages must employees be paid? What legal liability will rest upon the architect for defective planning or the engineer for defective execution of the plans?

Suppose you are a sales representative, and want to sell your wares to a plant manufacturing atomic energy equipment—how would you do it? Would your present trader's license suffice? Whom would you approach? With what local and federal licensing laws would you have to comply? How would you clear security hurdles before you could even hope to get your foot in the door?

Then suppose you had an excellent idea for developing atomic energy, but you had no money with which to do it. Under the present local and federal law, could you get adequate financing? What hurdles would the Securities and Exchange Commission make you jump in protection of the public's interest before you could sell stock? And what would or could your state tax commission say about it?

Suppose your child's school installed an atomic energy heating plant, and something went haywire? What legal responsibility could be placed on officials if your child were injured thereby?

The above is not intended to frighten anyone—or to attempt to hold back the wheels of progress—no one can do that. Rather, it is intended to provoke thought on this most timely subject, and to counteract the seeming attitude of lethargic *laissez faire*. By acting, should we suddenly be confronted with the factual coming of age of atomic energy, we should not find ourselves inadequately protected under the law and be caught with our proverbial trousers at half-mast.

# The New International Law:

# Nationalization and Partnership

by Dr. Charles Malik • *President of the General Assembly of the United Nations*

**When the American Society of International Law met at U. N. Headquarters in New York last March, Dr. Malik was asked to address the opening session. Although brief, his remarks set forth an excellent statement of the trend of international law.**

Many of you are doubtless familiar with the discussions that have recently taken place in the United Nations in regard to the stimulation of private investment and trade, with particular reference to what are sometimes referred to as the less-developed countries.

If one faces the world situation realistically, one is compelled to recognize that this stimulation is a function of two sets of conditions, one political and the other economic. It is not realistic to expect private investment and trade to operate in a vacuum without any regard to overriding political considerations emanating from the fundamental national policies of governments. Nor is it realistic to expect private capital to flow except where it can function under stable and lucrative conditions.

As trade and investment expand in these regions law is forced to transcend national levels and to cope with diversities of concepts and systems.

You in the United States, with your forty-nine state systems, and I understand that all of your states are considered to have some elements of sovereignty, are accustomed to grappling with these problems. You are also accustomed to dealing with problems of accommodating free trade to the activities of state institutions.

It is a characteristic of the world today that there are two fundamental systems: one a system in which trade and investment operate more or less freely, subject of course to regulation but not dictated or planned by state institutions; the other a system where all production, all trade, all investment is conducted pursuant to centralized planning and through state institutions.

We cannot forever continue with these two systems fighting each other. There must be an accommodation, a recognition on both sides of each other's presence.

The Asians, Africans and Latin Americans, that is to say, the peoples with less industrialized economies, so far as the impact of industrialism upon them is concerned, want either to industrialize themselves and thereby become economically independent of the more industrialized countries, or, insofar as there must persist considerable economic interdependence between them and the more developed countries for a long time to come, to have an equitable if not an equal share in the management of enterprises bearing upon their economies.

While it is happily true that exploitation now is out of the question, a much more wonderful prospect opens up, namely, partnership. There is no reason to suppose that corporation laws and regulations are sacrosanct, and in their dealings with Asia, Africa and Latin America these great Western concerns must henceforth modify their rigidity in favor of much greater flexibility and openness of mind. The concept of nationalization must now be viewed as a norm and whole new systems of partnership between governments and corporations must be sought. The underdeveloped cannot develop themselves without the agency of the developed, and the developed cannot creatively perform this function without the willing consent of the underdeveloped. In this mutuality of need and complementarity of function we have a natural given condition for the development of a new system of international economic law. The two fundamental regulative principles of this new international law system are nationalization and partnership. Let therefore people be guided by their higher interests, their higher selves; let their enlightened self-interest be their dominant theme; let them see that the association of equals is far more glorious and stable than the association of superior and "native"; and let them rise to the level of our common humanity beyond all distinction of race, color, system and even culture; in short, let them be men and not mere economic exploiters or economic animals, and the envy and distrust and recalcitrance of the underdeveloped as well as the over-weening paternalism and insatiable greed of the developed will be overcome.

# Copyright Law:

# Titles in the Entertainment Field

by **Samuel W. Tannenbaum** • *of the New York Bar (New York City)*

**The choice of a good title for a play, motion picture or novel has become a matter of great competition, according to Mr. Tannenbaum. A good title must be novel, attractive and brief. Once chosen, further problems arise—can the producer of a motion picture use the name of a popular song as the title of the picture? Suppose a novelist selects as the title for his best seller the name of a play that folded after two or three nights on Broadway—does the author of the play have any right of action? Mr. Tannenbaum discusses these and many other problems arising out of titles.**

## *I. The Importance of a Good Title*

There is no industry which is more concerned with the importance of an attractive title or name for its product than the amusement field. The oldest and most effective lure is a title which is short, attractive and easily associated in the public mind with the product and its owner.

With this concept in mind, the amusement industry, with which this discourse will be primarily concerned, has been for generations unrelentingly zealous in its quest for a simple, magnetic title.

The reservoir of novel and attractive titles, having evaporated almost to a state of aridity, has not only seriously limited the area of selection, but has also created keener competition in the choice of a title among those engaged in literature, drama and in the motion picture, radio and television fields.

Even though the world's phenomenal scientific and technological growth has spawned many original terms, readily adaptable as titles for novels, plays, motion pictures, radio and television presentations, it has not reduced, to any great extent, the rivalry in the adoption of titles.

As "the first gleam of a gilded title" lightens the eyes of a reader, so does an attractive title gladden the heart of a theatrical and motion picture producer and radio and television broadcaster.

A luminous marquee announcing the plays or motion pictures, *Witness for the Prosecution; South Pacific; Oklahoma!;* or *The Caine Mutiny,* will continue to ensure increased public interest for a long time to come.[1]

As far back as 1936, a motion picture company was said to have paid $22,500 for the use of the title to the novel *Wake Up and Live,* which was then considered to be the highest price for the use of a title.[2]

In 1937, there were 36,000 titles of feature pictures and short subjects registered on the release index of the Motion Picture Association of America; today there are over 50,000 titles registered.[3]

On November 15, 1947, there were thirteen stations on the air with regular television programs in the United States.[4] As of June 1, 1957, there were 544 television stations operating in 272 U. S. cities, forty-eight states, Hawaii, the District of Columbia and Puerto Rico.[5]

## *II. A Title Is Not Protected by Copyright*

It is firmly established that a title, *i.e.,* the name of the work, is not protected by the copyright of the work.[6] The foregoing principle enunciated as far back as 1852, has been consistently followed.[7] Not only laymen but also lawyers frequently speak erroneously of securing "copyright" for a title.

While the forum for the determination of issues arising under statutory copyright is exclusively the federal court, controversies limited to the unlawful uses of titles are governed by the principles of unfair competition and are triable in the state courts. A claim of unfair competition "may be joined with a substantial and related

1. "It is generally believed by motion picture executives and theatre managers that an appropriate and intriguing title that arouses public curiosity, or a title that has achieved fame and wide popularity as a book or play, has a profound influence on the success or popularity of a motion picture. Numerous examples of distinctive and unusual titles on widely popular pictures support the theory. For this reason more and more attention is being given to titles by the producers and distributors of modern motion pictures." FILM DAILY YEAR BOOK OF MOTION PICTURES, 1958, page 951.
2. VARIETY, May 3, 1936
3. *Op. cit. supra,* note 1, page 952.
4. 1948 RADIO ANNUAL, page 45.
5. *Op. cit. supra,* note 1, page 911.
6. *Jollie* v. *Jacques,* 1 Blatch. 618 (1852).
7. *Columbia Pictures Corp.* v. *National Broadcasting Co.,* 137 F. Supp. 348 (D.C.S.D. Cal. 1955).

claim under the copyright, patent or trade mark laws".[8]

As the only means of preventing the use of a conflicting title is by injunction in a court of chancery, the wide discretion of that court makes it rather difficult to find consistency in the great body of conflicting opinions. As was so quaintly stated by John Selden (1584-1654), "one chancellor has a long foot, another a short foot, a third an indifferent foot—'tis the same thing in the chancellor's conscience".[9]

In the same vein, Judge Leon R. Yankwich, Chief Judge, U. S. District Court for the Southern District of California, cites the following incident:

> Some years ago, Professor Zechariah Chafee, Jr., began an article on unfair competition with a story: "Several years ago when Edward S. Rogers, one of the leading American writers and practitioners in the field, was lecturing on Unfair Competition, he asked a student: 'What is your idea of this subject?' He got the answer: 'Well, it seems to me that the courts try to stop people from playing dirty tricks.'" Mr. Rogers comments, "One might spend weeks reading cases and find many definitions less satisfactory than this."[10]

## *III. The Law of Unfair Competition*

Judge Learned Hand, more than thirty-three years ago, stated ". . . there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today."[11] The distinguished jurist, well steeped in the classics, undoubtedly intended the word "plastic" to connote "developing" or "growing", derived from its Greek and Latin origin.

The early rigid formalistic principles have given way to the present broad and more realistic doctrine, in response to the ethical as well as the economic needs of society.[12]

"Palming off" and competition in the same or similar industry or territory were absolute prerequisites for recovery. The misappropriation of one's name, reputation or business good will are the present criteria, irrespective of the existence of actual competition between and the location of the parties.[13]

The invasion of a property, acquired by one's contribution of effort, money, resources and industry is the present test. The terse statement by the federal court in Alaska, aptly expresses the present ethical touchstone, "One may no longer earn his bread by the sweat of someone else's brow."[14]

A few illustrative cases contrasting the old and new principles of unfair competition may suffice:

In 1913, the publisher of the well-known "Nick Carter" stories was denied an injunction against a motion picture company using the title *Nick Carter, the Great American Detective, Solving the $100,000 Jewel Mystery,* on the theory that no competition existed between a novel and a motion picture.[15]

This decision may perhaps be justified by the then recent birth of the motion picture industry, the impact of which had not yet been felt. Motion pictures in and about 1913 were, in the main, shorts based on sketches or single incidents, rather than on more developed plots and stories built around a character.

It was not until 1912, that "motion picture photoplays" and "motion pictures other than photoplays" were granted statutory copyright protection, as such.[16] Prior thereto, they secured statutory copyright as photographs under Section 5(j).

It is now well settled that "direct competition" is not a necessary element of proof. The existence of "any form of unfair invasion or infringement" or "commercial immorality" is sufficient.[17] This departure was clearly established by the U. S. Supreme Court in 1918.[18]

The author of a poem entitled *The Ballad of Yukon Jake* prevented the use of the title *Yukon Jake* for a motion picture, even though the plot and incidents were entirely dissimilar.[19]

The author of the "Frank Merriwell" series of stories enjoined a motion picture company from using the title *Frank Merriwell,* even though there was no similarity in "theme, design or plot".[20]

A radio broadcasting company was prevented from using the title *Stella Dallas,* which was the title of the well-known novel, play and motion picture.[21]

The use of the plaintiff's title for the popular radio program, *Information Please,* by the defendant for a magazine was enjoined. The court stated that while "in the early days" the two words *Information* and *Please* would have been deemed common place and descriptive for use as a magazine, "at the present time, however, the law of 'unfair competition' lays stress upon the element of unfairness rather than upon the element of competition".[22]

Jack Lait and Lee Mortimer had written several popular books under the titles, *New York Confidential, Chicago Confidential,* and *Washington Confidential.* Jack Lait had also conducted a radio program, *Jack Lait Confidential.* One of the defendants published a book, *Baseball Confidential.* The plaintiffs contended that they had a "property right" in the word *Confidential,* "flowing either from a common law trademark, the acquisition of a secondary meaning or the good will that the distinctive titles using the word 'confidential' have created." The court disposed of these contentions by holding that the word *confidential* was "a descriptive one of every day usage" and that even when used with *Washington, New York, Chicago* and *Baseball,* "it connotes, in common parlance, the inside story of the subject treated by the book".[23]

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8. Title 28 of the Federal Judicial Code, §1338(b) revised in 1948.
9. TABLE TALK—"Equity" (1689).
10. *Patent, Copyright and Trade Mark Cases* by Leon R. Yankwich—NOTRE DAME LAWYER, May, 1957, page 440.
11. *Ely-Norris Safe Co.* v. *Mosler Safe Co.* 7 F. 2d 603, 604 (2d Cir., 1925).
12. *Metropolitan Opera Assn.* v. *Wagner-Nichols Recorder Corp.* 101 N.Y.S. 2d 483, 492 (Sup. Ct. N.Y. 1950); *aff'd.* 107 N.Y.S. 2d 795 (1951).
13. *Ibid.*, page 491.
14. *Vetch* v. *Wagner,* 116 F. Supp. 904 (D. C. Alaska, 1953).
15. *Atlas* v. *Street & Smith,* 204 F. 398 (8th Cir., 1913); page 406: "It is not thought that the public will be deceived into belief that it is seeing a reproduction of one of complainant's stories when it witnesses that displayed from defendant's film . . . We do not think a moving-picture show is of the same class as a written book. One belongs to the field of literature; the other to the domain of theatrical." The dissenting opinion of Judge Hook evidenced a more prophetic attitude.
16. U. S. Copyright Act, August 24, 1912, §5(1)(m).
17. *Op. cit. supra,* note 11.
18. *International News Service* v. *Associated Press,* 248 U. S. 215 (1918).
19. *Paramore* v. *Mack Sennett,* 9 F. 2d 66 (S.D. Cal. 1925).
20. *Patten* v. *Superior Talking Pictures,* 8 F. Supp. 196 (S.D. N.Y. 1934).
21. *Prouty* v. *National Broadcasting Co.,* 26 F. Supp. 265 (D.C. Mass. 1939).
22. *Golenpaul* v. *Rosett,* 18 N.Y.S. 2d 890, 891 (Sup. Ct. N.Y. 1940).
23. *Crown Publishers Inc.* v. *David McKay Co.,* 107 N.Y.S. 2d 176, 177 (Sup. Ct. N.Y. 1951).

### *a. Song Titles*

For many years, there were published innumerable songs bearing the identical title. So long as there existed no similarity of words or music, no attempt was made to enjoin such use. The U. S. Copyright Catalogues of music including published and unpublished songs are replete with songs bearing identical titles by different composers, the words and music being dissimilar.

However, as recently as 1951, the composers of the song *Red Roses for My Blue Baby* brought an action against the publisher for breach of contract or trust for the latter's alleged failure to promote the sale of plaintiffs' song, asserting that the publisher had "successfully promoted the infringing and competing work, *Red Roses for a Blue Lady*" which was published by the same publisher. The court stated that "mere similarity of titles might not ordinarily be significant, but it takes on some significance in view of the fact that defendant published both songs."[24]

In what appears to be one of the earliest decisions, which involved the use by a motion picture company of the title *The Man Who Broke the Bank at Monte Carlo,* which was previously used for a song, the Canadian lower court awarded a money judgment against the motion picture company for such competing use. The Canadian appellate court reversed. Thereafter, the Privy Council dismissed the appeal and upheld the Canadian appellate court, stating that the title of the song was not infringed by its use as the title of the film; that since only the title of the work was involved, there could be no claim of copyright infringement nor any "passing off"; that no competition existed between the use of the same title for a song and a motion picture.[25]

The United States Court of Appeals (7th Circuit) in *Becker* v. *Loew's Inc.*[26] citing with approval the above decision, stated:

> It seems inconceivable that when or if he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle.

Nevertheless, at present, as the use of the title of a popular song for the title of a motion picture frequently results in added publicity and advertising, motion picture companies pay considerable sums for the use of the title as well as the music.

$40,000 is said to have been paid for the use of the title and the background music of Richard Rodgers' song *Slaughter on Tenth Avenue.*[27]

$15,000 was reported to have been the price for the use of the song title *Young at Heart* and the music.[28]

Illustrative of the close association between the use of titles of songs and motion pictures are the following: *A Certain Smile; Three Coins in the Fountain; Love Is a Many Splendored Thing;* and *High Noon,* the music of the latter three having won Academy Awards. During the past six years, at least four of the most popular motion pictures used the same title as the title of the popular song included in the motion picture.[29]

However, from 1935 to 1951, it does not appear that any song which won an Academy Award bore the same title as the title of the motion picture in which it was used.

Before the phenomenal growth of the recording industry, the popularity of a song resulted from its "plugging" by professional singers in theatres, cabarets and restaurants, engaged mainly by music publishers. This created substantial public sales of the sheet music. By reason of the present meteoric popularity of musical recordings and use of music in motion pictures and more recently in radio and television, titles of songs have attained great importance and have acquired substantial values as property. In my opinion, the use of song titles for motion pictures, radio and television indicates a tendency toward competition in these areas.

## *IV. Sources From Which Titles Are Derived*

Sir James M. Barrie was frequently beseeched by young authors for his advice in the choice of an attractive title for their books. On one occasion, an aspiring author handed Barrie his 1,500 page manuscript. Barrie made no attempt to open it, but said, "Tell me, young man: are there any drums, or any trumpets in your novel?" Taken back, the young author replied, "Mr. Barrie, it's not that kind of a novel at all." Barrie then retorted, "Perfect, call it 'No Drums, No Trumpets'."

Aside from facetious incidents such as the foregoing, the origin of most titles stems from the sources hereinafter discussed.

### *a. The Bible*

The Bible is a treasure-trove of titles for books, plays, and motion pictures. A few of such outstanding titles are: *Ten Commandments; David and Saul; The Robe; Voice of the Turtle; Cymbals of David; The Story of Ruth.*

**Samuel W. Tannenbaum is a graduate of Columbia University (A.B., A.M. and LL.B.). He is a past President of the Copyright Society of the United States and has lectured at Yale and New York University Law Schools. He is the author of treatises on copyright and unfair competition.**

24. *Nelson* v. *Mills Music Inc.*, 104 N.Y.S. 2d 605, 606 (Sup. Ct. N.Y. 1951), *aff'd.* 112 N.Y.S. 2d 495 (1952), *aff'd.* 304 N.Y. 739 (1952).
25. *Francis, Day & Hunter, Ltd.* v. *Twentieth Century Fox,* A. C. 112 (1940).
26. 133 F. 2d 889, 893 (1943).
27. NEW YORK TIMES, May 4, 1957.
28. BILLBOARD, May 17, 1954.
29. The Bridge on the River Kwai (1957); Around The World in Eighty Days (1956); Marty (1955); From Here to Eternity (1953).

### *b. Historical*

History, both ancient and modern, has furnished many titles for successful motion pictures: *Attila the Hun; Mayerling; The Clansman; All Quiet on the Western Front.*

### *c. Popular Book or Play*

The titles of recognized literary works are a fruitful source: *Moby Dick; The Hunchback of Notre Dame; War and Peace; Ivanhoe; Quo Vadis; Ben Hur; Around the World in 80 Days.*

Titles of books on the Best Seller list are avidly sought by motion picture producers: *The Young Lions; Peyton Place; Marjorie Morningstar; Bonjour Tristesse.*

Titles are also taken from popular plays, old or current: *The Devil's Disciple; Anna Lucasta; Cyrano de Bergerac; Streetcar Named Desire; Desire Under the Elms; Death of a Salesman.*

### *d. Biographical*

Titles of dramatizations and picturizations of the lives and exploits of famous people of the past or present are especially attractive: *Abe Lincoln in Illinois; Sunrise at Campobello; The Jolson Story; Story of Louis Pasteur; J'accuse* (Emile Zola); *St. Louis Blues* (W. C. Handy); *The Spirit of St. Louis* (Lindbergh).

### *e. Current Events*

Dramatic news events are followed by a mad rush by motion picture producers and broadcasting companies to secure priority in the use of the title:

Sputnik caused a spurt, resulting in the filing of the following titles with the Motion Picture Association of America: *Red Satellite; Lost Satellite; Runaway Satellite; Satellite to the Moon; Race to the Moon; Men* (or *Man*) *in the Sky; The Astronauts; Artificial Moon; Baby Moon; Circling the Globe; Man Made Moon; Exploring the Universe; 18,000 Miles an Hour; 560 Miles Up.*

Russia would not be outdone. The Moscow Science Fiction Film Studio has been working on *I Am a Space Pilot.*[30]

Musical compositions have derived many titles from dramatic current events. Lindbergh's heroic transoceanic plane trip in 1927 brought forth a flood of song titles, such as, *Lindy; Lucky Lindy; Lindy, Youth with the Heart of Gold; Like an Angel You Flew into Everyone's Heart.*

World War I produced: *Over There; Where Do We Go from Here?; Anchors Aweigh; It's a Long Way to Tipperary.*

### *f. Accidental Occurrences*

Clifford Odets conceived the title, *The Flowering Peach,* in an odd way. Although its theme is about Noah and the Flood, the title was not of biblical origin. While reading the newspaper, Odets noted that the third hole of President Eisenhower's favorite golf course in Atlanta was called *The Flowering Peach.* In Odets' play reference is made to a peach tree, which flowered after the Flood, symbolic of the renewal of life.[31]

A spontaneous utterance often accidentally furnishes a composer with a good title for his song. Under the escort of Maurice Chevalier, Alan Jay Lerner and Frederick Loewe were partaking of France's stimulating potions at a sidewalk cafe in the Bois de Boulogne. Chevalier, observing their swivelling heads as the girls rushed for the bus station, is said to have remarked to Lerner and Loewe, "You know boys, I'm glad I'm not young any more." Thus was born the title for their popular song in the motion picture *Gigi.*[32]

## *V. Works in the Public Domain*

As previously stated, copyright does not grant the copyright proprietor the exclusive right to the use of the title of the work, even during the term of the copyright; nor does it prevent the use of the title for an entirely different work.[33] Whether the work has copyright protection or is in the public domain, the remedy is an action for unfair competition.

The Mark Twain case has furnished us with a decision which clearly sets forth the principle applicable to the use of a title of a work in the public domain. In that case, some of Mark Twain's writings were published without copyright protection. The defendant published some of Mark Twain's work as *Sketches by Mark Twain.* The demurrer to Mark Twain's complaint was sustained. By Mark Twain's failure to protect the work by copyright, "it becomes public property, and any person who chooses to do so, has the right to republish it, and to state the name of the author in such form in the book, either upon the title page or otherwise, as to show who was the writer or author thereof".[34]

However, had the defendant published his version of the Mark Twain work with new matter under the title *Sketches by Mark Twain,* he would have made a false statement, subjecting him to an action for unfair competition.

Where the work has fallen into the public domain, the title is said "to go with it". It may be freely used, subject however, to the principles of unfair competition, as previously discussed. This is well recognized and is still consistently followed.[35]

## *VI. Substantial Claims for Misappropriation of Title*

An interesting decision emanating from the courts of California was *Jackson* v. *Universal Pictures.*[36]

Seventeen thousand five hundred dollars was awarded by the jury to a dramatist, where a motion picture company used his play title *Slightly Scandalous,* the plot, incidents and characters being dissimilar. The play opened in Philadelphia, where it was "panned" in all the Philadelphia papers, closing after fifteen performances in less than two weeks; an average of two hundred persons attending each performance, although the theatre had a capacity of over 1500 persons. In New York, the play was also "panned" by the newspapers, where it closed after seven

*(Continued on page 527)*

30. FILM DAILY, December 5, 1957.
31. N. Y. TIMES, December 12, 1954.
32. N. Y. HERALD TRIBUNE, May 11, 1958.
33. *Corbett* v. *Purdy,* 80 Fed. 901 (S.D. N.Y. 1897) citing *Osgood* v. *Allen,* 1 Holmes 185. F. Cas. No. 10, 603 (D.C. Maine 1872). This principle has been consistently followed.
34. *Clemens* v. *Belford,* 14 Fed. 728, 730; *Atlas Mfg.* v. *Street & Smith,* 204 Fed. 398 (8th Cir., 1913); *appeal dismissed,* 231 U.S. 348 (1913) (C.C.N.D. Ill. 1883), cited with approval in *Shostakovich* v. *Twentieth Century Fox,* 80 N.Y.S. 2d 575 (Sup. Ct. N.Y. 1948); *aff'd.* 87 N.Y.S. 2d 430 (1949).
35. 13 C.J. SEC. 243; 18 C.J. SEC. 80 and cases cited.
36. *Jackson* v. *Universal International Pictures,* 212 P. 2d 574 (Cal. D. C. App. 1949); *reversed* 222 P. 2d 443 (Sup. Ct. Cal., 1950).

# The Education of an Army Lawyer:

# The Judge Advocate General's School

by Lt. Lewis T. Sweet, Jr., and Lt. Harvey Paticoff • *Judge Advocate General's Corps, U.S.A.R.*

**The Army's Judge Advocate General's School at the University of Virginia is now recognized as presenting one of the finest graduate legal courses in the country. Set up early in the Korean War to train new Army lawyers for their jobs, the school is now on a permanent basis. Lieutenants Sweet and Paticoff describe the School in this article.**

The members of one of the oldest law firms in the United States will soon celebrate its one hundred and eighty-fourth birthday. When George Washington assumed command of the Continental Army on July 3, 1775, he remembered his need for legal advice during his earlier service as a militia officer for the State of Virginia, and on July 28, 1775, he appointed Colonel William Tudor, of Boston, the first Judge Advocate of the Army. The selection of Colonel Tudor established, at least temporarily, the Office of The Judge Advocate of the Army. However, it was not until 1849 that Congress provided permanently for such an office. In 1869, the size of the Corps was increased to eight, and at the outbreak of World War I there were seventeen regular Army Judge Advocates. The citizen-army concept of a million men springing to arms overnight when needed was reflected in the Judge Advocate's service, and during World War II the Office of The Judge Advocate General of the Army became the full-fledged legal office it is today. From a strength of 115 in 1940, it has grown to a regular Army authorization of 786 and an active duty strength of over a thousand officers. Some of the great names in the history of our country are found in its rolls: Major John Marshall, Deputy Judge Advocate at Valley Forge in 1777; Major Henry Wheaton; Major John Chipman Gray; Major Felix Frankfurter; Colonel Edmund Morgan; Lieutenant Colonel Patrick Hurley; and Major Henry L. Stimson.

From the days of the Revolution until the opening of the second World War in 1941, The Judge Advocate of the Army was able to discharge his duties with a very small group of regular officers augmented from time to time during periods of emergency by civilian attorneys who were placed in uniform and who performed their military requirements without special training. However, the size of the conflict between 1941 and 1945 and the assumption by the United States of world-wide responsibilities which today see our Armed Forces stationed throughout the world have increased the complexity of the legal problems facing the United States Army to a point that could not possibly have been foreseen during the early days of the Corps.

Today judge advocates staff the Office of The Judge Advocate General in Washington, D. C., the Branch Office of The Judge Advocate General in Fort Holabird, Maryland, and The Judge Advocate General's School in Charlottesville, Virginia. Judge advocate officers are assigned to posts, divisions, corps, armies, oversea commands, and other headquarters in every part of the Army establishment. Army judge advocates supervise a system of criminal courts which try and review thousands of cases each year. They also are the trusted legal advisers of all senior Army commanders and their staffs. They administer the processing of claims arising out of the multitudinous operations of the Army, and they are charged with the protection of the Army's interests in hundreds of patents, the acquisition, possession, and disposition of millions of acres of land which are controlled by the Army, and the drafting and implementation of legislation, executive orders, and administrative regulations pertaining to the Armed Forces.

These problem areas, peculiar to the Armed Services, caused The Judge Advocate General of the United States Army to provide for specialized refresher training for judge advocates as they were called to active duty early in World War II. This training was provided by a faculty of three officers at the National University Law School in Washington, D. C. By August, 1942, the expanding school was moved to the Law Quadrangle of the University of Michigan in Ann Arbor, Michigan, and

classes for both judge advocate officers and for officer candidates were conducted at the University until 1946. The end of the war and the consequent reduction in the strength of the Armed Forces made the operation of such a school no longer necessary, and it was closed in that year.

### *The J.A.G. School . . . Fort Myer, Virginia*

The Judge Advocate General of the Army, profiting from the experience of the war and recognizing that the expanding responsibilities of the Corps required special training for its members, initiated a study seeking a solution to the problem. With the coming of the Korean Conflict, tentative plans crystallized, and as the need for judge advocates was once again acute, a temporary school was established at Fort Myer, Virginia, on August 9, 1950, where approximately two hundred officers called to active duty received refresher training. The demonstrated need for the provision of continual special training for Army lawyers confirmed the determination of The Judge Advocate General to establish a permanent school. A committee was formed in his office and after viewing many possible sites the University of Virginia with its excellent facilities was chosen as the permanent home of The Judge Advocate General's School. Brigadier General Charles L. Decker, now the Assistant Judge Advocate General for Military Justice in the Office of The Judge Advocate General of the United States Army, assisted to the fullest extent possible by Colgate W. Darden, Jr., President of the University of Virginia, and F. D. G. Ribble, Dean of the School of Law of the University of Virginia, played a most important part in founding the School, and he was chosen as its first Commandant in 1951 and served as such until June 15, 1955.

In 1958, the School was organized into its present structure, consisting of an Administrative and Management Office and three departments: Academic; Special Projects and Publications; and Reserve Activities and Plans. Since its founding in 1951, the School has given resident instruction to some 2,500 individuals, the great bulk of whom have been judge advocates; and in February, 1959, the School graduated its twenty-ninth Special Class.

Why does the Army prefer school training for its newly commissioned officers instead of on-the-job training as practiced by most civilian law firms? The paramount objection to on-the-job training is the element of time. In the civilian community the young lawyer, after two or three years of on-the-job training, attains the skills necessary to perform adequately the tasks he will likely be assigned. There remains only the need to acquire the experience that will be gained by years of practice. In the Armed Services, however, the majority of the lawyers complete their obligated period of service during these first two or three years and then return to civilian life. Thus, there is a need for a short concentrated period of study for the young lawyer at the very beginning of his military career if the Army is to receive substantial benefits from his services.

There is also a need for specialized courses for the lawyers who choose a military career and a need for a graduate course for senior officers who are about to be assigned as senior legal advisers to large commands involving thousands of men and millions of dollars worth of land and equipment. It is the mission of the School to meet these needs.

Periodically each year, newly commissioned officers of the Corps attend an eleven-week course designed especially to introduce them to the specialties of military law. These students are nearly all recent law school graduates who have met the highest standards, both morally and professionally, prior to being appointed as commissioned officers in the Army. The majority of them have graduated with high standings in their classes, and many of them were editors of their schools' law reviews. In nearly every case these officers will, upon completion of the course, be assigned duties requiring the solution of problems with which they had no contact or experience in civilian education or practice. The instruction at The Judge Advocate General's School will be the only introduction they will have received in these areas of the law. In effect, the School, by its many courses, is attempting to reduce to a minimum the need of assigning problems to officers having little or no knowledge in the particular field. The student is introduced to every specialized field of law he is likely to encounter and familiarized with the statutes, regulations and research tools involved. This includes such "specialties" as government procurement, claims for and against the Government, military justice, military affairs (including retirement, promotion and elimination, pay and allowances, prohibited activities, boards of officers, line of duty determinations, etc.), civil disturbances, martial law, international law, matters pertaining peculiarly to federal reservations, and the furnishing of legal assistance to military personnel with personal problems involving domestic relations, property, taxation, and other civil matters.

Not only must the Army lawyer become competent in unfamiliar areas of the law, but as an officer he must understand the corresponding military rights and obligations, military organization and procedures, and the problems and relationships of the personnel of the military community. Most of these purely military subjects are taught the new judge advocate during eight weeks of basic infantry officer training which he usually receives at Fort Benning, Georgia, immediately on entry into the service.

### *The Advanced Class . . . Training for Key Jobs*

The Advanced Class is composed of a small group of officers, approximately thirty in number, who have had from eight to twelve years of experience as judge advocates. These officers are carefully chosen from among those who, by their accomplishments, have demonstrated that they are ready to assume key positions as legal advisers on the staffs of large commands or as the heads of major divisions in the Office of The Judge Advocate General. They spend thirty-five weeks in the intensive study of military law, including detailed study of the subjects to which the Special Class is only introduced.

One of the most interesting aspects

of this graduate program is the preparation by each student of a thesis in an important area of the law which it has been determined requires further research and development. The students are urged to be completely objective and to use independent analysis in writing these theses. Every attempt is made to create an atmosphere of academic freedom so that each student can make a real contribution to the field of military law. Several of the theses have been the basis for leading articles in various law journals.

In recent years, the Advanced Class has become what may be truly classified as an interservice enterprise. At present, there are two Navy officers and one Marine officer assigned as members of the Advanced Class. The School has also taken on an international flavor with one Philippine and one Burmese officer attending the Advanced Class and three Korean officers and two Viet-Namese officers attending the Special Class.

Experience has proved that the Advanced Course is of great benefit to the Corps and to the Army. As the staff legal adviser of a command, an officer must have an over-all background in all areas of military law. The graduate study in the Advanced Class furnishes him with that background. As expressed by the Dean of the New York University School of Law:

> The graduate program is expensive, it is difficult to administer, it takes a good deal of time and energy of our best people, but it is in our judgment worth the cost and the effort. There are many advantages in having advanced law students who have had some practice and who approach their work with quite a different background and a different point of view from that of the undergraduate students. There is unquestionably a great demand for this type of program.[1]

Many distinguished speakers have addressed the Advanced Class and the Special Class on timely subjects of interest to the military lawyer. Among the speakers have been the President of the American Bar Association, the Secretary of the Army, the judges of the United States Court of Military Appeals, The Judge Advocates General of the Armed Services, and many other civilians and military men—judges, government officials, private practitioners, and professors of law.

Signal Corps

**Lewis T. Sweet, Jr., is now assigned to the Second Armored Division at Fort Hood, Texas. He is a graduate of the University of Texas and of the Southern Methodist University Law School and was admitted to the Texas Bar in 1956.**

Ralph Thompson

**Harvey Paticoff is stationed at the University of Virginia in Charlottesville, where he is a member of the staff and faculty of The Judge Advocate General's School. He is a member of the New York Bar.**

The American Bar Association has shown considerable interest in the School and has been most co-operative in providing advice and assistance in the continuing effort to improve both the courses of instruction and the administration of the program. The accreditation of the graduate program or Advanced Course by the American Bar Association in February, 1955, is one of the high points in the history of the School. In the report of his inspection in October, 1958, Mr. John G. Hervey, Adviser to the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, made the following statement:

> *General.* The subject school continues to progress satisfactorily. There exists a healthy ferment and willingness to experiment. The student body is selective. The course of study has been revised repeatedly in the light of the critiques made by the graduates. The textual materials undergo continuous revision. The staff is highly competent. The facilities are very satisfactory. The school continues to be, in the opinion of the Adviser, the best of the specialized graduate law schools and the program well merits the continued approval of the American Bar Association.

On the basis of this accreditation and upon the recommendation of a distinguished group of lawyers and educators who visited the School at the request of the Department of Health, Education, and Welfare, authority was requested of the Congress to confer the degree of Master of Laws upon the graduates of the Advanced Course. At present, the bill, H. R. 6064, has been referred to the Armed Services Committee of the House of Representatives.

Further evidence of the interest of the American Bar Association is the award on behalf of the Association of a certificate of merit to the student in each Advanced and Special Class who attains the highest average during his course of study.

### *Courses, Seminars and Conferences*

Additional activities in the vein of continuing legal education include various short courses, seminars and conferences. A Procurement Law Course, which is given three times each year, provides three weeks of instruction in the specialized field of government contract law to civilian and military attorneys engaged in procurement activities in many agencies of the Government,

1. Niles, *A Graduate Program for Lawyers*, 1 J. Legal Ed. 590, 595 (1949).

including the Departments of Justice, Interior, Defense, Army, Navy and Air Force, as well as the General Accounting Office, General Services Administration, and the National Security Agency. An even more specialized course in contract termination, which is given once each year, provides two weeks of instruction for government attorneys and selected specialists actively engaged in termination procedures. Also available to government attorneys are periodic three-day seminars concerning procurement subjects of current interest. To date, they have dealt with the Contracting Officer, Contract Termination, Labor Law and Utilization of Government Property. Since 1951, about 1,000 individuals have received procurement instruction. A further method of providing legal education and current information to the government procurement lawyer is the biweekly *Procurement Legal Service* (Department of the Army Pamphlet 715-50 series), with a circulation of about 3,500 copies. It contains digests of opinions and decisions of The Judge Advocate General of the Army, Armed Services Board of Contract Appeals, Comptroller General, and the various federal courts.

Another very important course that has been instituted is the three-week Law Officer Course. This course is given twice each year to a group of outstanding judge advocates who are being specially groomed to perform the duties of a law officer of a general court-martial. Additional responsibilities are continually being placed upon the law officer by the decisions of the United States Court of Military Appeals. His function now is almost identical to that of a civilian trial judge. In a recent decision by the Court of Military Appeals, this similarity was emphasized by declaring that members of the court (members correspond to a jury in a civilian trial) may no longer have a copy of the *Manual for Courts-Martial* with them during their deliberations.[2] The practice had been for the law officer to refer the court members to certain paragraphs of the *Manual* for instructions as to the proper conduct of their voting and deliberations. Because the *Manual* also contains an extensive discussion of substantive law, some of which might be inapplicable to the case, the Court of Military Appeals has said that this practice must cease. All instructions to the court must now be contained in the instructions of the law officer and the court may not refer to any other material in reaching its conclusions. This decision requires even more exhaustive and careful preparation by the law officer, and it is the purpose of the Law Officer Course to emphasize those elements of law and procedure with which he must be thoroughly familiar.

Because of the need for refresher training of National Guard judge advocates not on active duty, a two-week course has been inaugurated for that purpose. Each year the course is given to approximately 50 per cent of the National Guard judge advocates, the other 50 per cent receiving the same instruction the following year. The instruction is revised every other year so that a continuing course may be maintained. A similar course is planned for officers assigned to judge advocate positions in United States Army Reserve units.

Although the primary mission of the School is resident instruction, it performs other important functions. Each year there is prepared by the Academic Department the necessary instructional material used by approximately 1,100 officers not on active duty who attend the eighty-seven judge advocate branch departments of United States Army Reserve schools located throughout the country. These students, by continuing their training, are helping to maintain a large well-trained group of reserve judge advocates who may be called upon in the event of mobilization. The instructional material used in these schools parallels that taught in the resident Special and Advanced Classes, although the instruction is, of course, extended over a much longer period of time. The staff of the Reserve Activities and Plans Department, in addition to the dissemination of this material, checks on its effectiveness through staff visits to the reserve schools.

For the benefit of those reserve judge advocates who are unable to attend a reserve school, the Reserve Activities and Plans Department also administers the judge advocate Army extension course program. A number of military personnel on active duty and civilian employees of the Armed Services also participate in the extension course program. Approximately 900 students are enrolled in this extension course program. A recent survey shows that 26 per cent of the reserve judge advocates and about 50 per cent of the National Guard judge advocates are participating.

### *Nonresident Courses . . . Six Tons of Lessons*

In the dissemination of the material for both these programs, the Reserve Activities and Plans Department each year mails almost six tons of material. Additionally, a USAR School Instructors' Conference is normally conducted each year. During this conference, the reserve judge advocates, who are instructors at the reserve schools, receive instruction in current developments in military law and discuss the administration of USAR schools and methods and techniques of instruction. This conference permits those who prepare the instructional material and those who use it to exchange ideas and thus contribute to its continuing growth.

The third department of the School, the Special Projects and Publications Department, is charged with the responsibility of providing adequate research tools for all judge advocates, conducting necessary research in the various fields of military law, and disseminating the results of these studies in periodicals, permanent publications and training films. About every ten days the *Judge Advocate Legal Service* containing recent developments in military law is distributed to all judge advocates and interested governmental agencies. This pamphlet contains digests of all the opinions of the Court of Military Appeals, selected opinions of the boards of review, pertinent decisions from federal and state courts, and opinions of The Judge Advocate General, the Attorney General and the Comptroller General. The *Judge Advocate Legal Service* and its supporting files also provide the material for the

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2. *United States* v. *Rinehart*, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

# A Reply to Mr. Rogers:

# The Papers of the Executive Branch

by Bernard Schwartz • *Professor of Law at New York University*

**In our October, 1958, issue (44 A.B.A.J. 941), we published Attorney General Rogers' statement on the right of the Executive Branch to withhold official documents from congressional committees. The statement, originally given before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, argued that the right to withhold such documents sprang from the doctrine of separation of powers. Mr. Schwartz answers Mr. Rogers in this article.**

In the October, 1958, issue of the JOURNAL, there is a strong presentation by Attorney General William P. Rogers of the right of the Executive Branch to withhold documents and other materials from the Congress. Mr. Rogers' paper takes an extreme view of the privilege of the Executive to withhold.[1] According to him, it is an established principle in our law that "in response to congressional requests for documents, the Executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest." [2]

The view of the Attorney General on so important a constitutional question is, of course, entitled to the greatest respect. It should, all the same, be borne in mind that even a formal opinion of the Government's highest legal officer is not, like the decision of a court, an authoritative formulation of the law. It is entitled only to the weight that its inherent merit wins for it. As the late Justice Jackson, himself a former Attorney General, aptly characterized it, the view of the Attorney General is "partisan advocacy",[3] which cannot bind later judicial judgment.

The Attorney General cites three principal sources of authority for the Executive privilege asserted by him: (1) Executive practice; (2) judicial decisions; and (3) separation of powers. These will be discussed in turn.

## *I. Executive Practice*

It is true that there have been Executive refusals to comply with congressional investigative demands. Such Executive practice can, however, of itself hardly be considered as conclusive or foreclose independent inquiry into the law, in the absence of an authoritative judicial decision on the subject. That there have been refusals by the Executive to supply information to the Congress does not necessarily prove that such refusals were legally justified.

A governmental practice conceived in error does not become elevated to the plane of legality merely because the error has been long persisted in. In the celebrated *Erie Railroad* case,[4] the Supreme Court held invalid a century-old doctrine governing the law to be applied in federal cases. The Court was not dissuaded by the fact that the uniform practice in the federal courts had been in accordance with the overruled doctrine. If this is true of an erroneous decision (followed as an authoritative precedent for so long) of the Supreme Court itself, it must certainly be true of an Executive practice which, as we shall see, finds no basis in judicial decision. Executive practice alone cannot authorize Executive acts which have no other legal basis.

This would be true even if the Executive practice cited by Mr. Rogers were uniform and unopposed. In actuality, the Congress has never assented to the claim that the Executive can determine, in its discretion, what documents it will withhold. An extremely suggestive precedent is to be found in the Senate in 1886. In January of that year, the Senate passed a resolution directing the Attorney General to transmit certain Department of Justice documents. Upon the Attorney General's refusal to transmit the papers requested, the Senate Committee on the Judiciary submitted a report which strongly affirmed the right of Congress to receive the information requested:

> It is believed that there is no instance of civilized governments having bodies representative of the people or of states in which the right and power of those

1. Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958).
2. *Id.* at 944.
3. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 649, note 17 (1952).
4. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

> representative bodies to obtain in one form or another complete information as to every paper and transaction in any of the executive departments thereof does not exist, even though such papers might relate to what is ordinarily an executive function... "Why should the facts as they may appear from the papers on file be suppressed? Is it because that, being brought to light, it would appear that malice and misrepresentation and perjury are somewhat abundant . . . ?"[5]

Following this report, the Senate strongly censured the Attorney General.

In the debate in the Senate, Senator Edmunds, the then chairman of the Judiciary Committee, referred to the "universal power of knowledge and information of the two Houses of Congress in respect to every operation of the Government of the United States and every one of its officers, foreign and domestic". According to him, both Houses of the Congress had a "right to know everything that is in the executive departments of the Government".[6]

The learned Senator stated that this was the first instance in some forty years in which either House had failed "on its call to get information that it has asked for from the public departments of the Government".

The committees of either House, said he, "have always obtained from the departments on their mere request everything that either House or its committees thought necessary for the proper discharge of their duties".[7]

Executive refusals to furnish papers to the Congress have been relatively few by comparison with the whole mass of instances in which congressional demands for information have been complied with. If Executive and legislative practice is to be considered, the grants as well as the refusals of information should be weighed. The readiness displayed by the Executive in innumerable cases in furnishing information to committees of both Houses is at least as strong as a precedent as the comparatively few instances of refusals.

## *II. Judicial Decisions*

The Attorney General, in his paper, cited no case directly supporting his extreme assertion of Executive privilege. As against the lack of decisions in support of the Attorney General's view, there is a veritable mass of contrary authority, which resoundingly repudiates the whole concept of privilege, even in cases involving only private litigants.

In the first place, it should be noted that John Henry Wigmore, the dean of the American law on the subject, strenuously opposed the whole concept of Executive privilege. Much of Volume 8 of his monumental *Treatise on Evidence* is devoted to a demolition of the claims of those who assert the doctrine of privilege. Wigmore is particularly caustic with regard to the argument that, in such cases, the public interest against disclosure must be considered paramount to the individual interest of private litigants, declaring:

> As if the public interest were not involved in the administration of justice. As if the denial of justice to a single suitor were not as much a public inquiry as is the disclosure of any official record. When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. "Necessity," as Joshua Evans said, "is always a suspicious argument, and never wanting to the worst of causes".[8]

That the Executive does not have the authority to withhold, even from private litigants, papers merely because it feels that disclosure would be contrary to public interest is shown by *Crosby* v. *Pacific S.S. Lines*.[9] The court there expressly relied upon Wigmore in rejecting a claim of official privilege. The fact pattern was somewhat unusual. The case arose out of a civil bankruptcy proceeding. A witness, who was an official of the British Ministry of Supply (not a party to the case), declined, on cross-examination, to produce internal correspondence and memorandums of the Ministry, on the ground that they were "confidential" documents belonging to the British Government. The case is relevant for our purposes because the federal court specifically stated that it would treat the British Ministry by the same standard as would "apply to a similar department of Government here". And the court concluded that there was no valid privilege in a case like this, saying:

> It is enough to say that for one to claim a privilege, he must make a showing that he is entitled to one, and that no such showing, in our opinion, was made here.

In other words, according to the instant court, an Executive department cannot refuse to disclose merely by raising a claim of official privilege.

Just as important is the fact that the court strongly emphasized that it is the function of the court, not the Executive, to determine what evidence is privileged. An attempt was made to bring the case under a California statute applicable "when public interest would suffer by disclosure". But, asked the court, "Does this mean that [the executive official] is final authority on that point? All reason says that the question is one for the court to determine." This is wholly contrary to Mr. Rogers' assertion that it is for the Executive itself to determine what matters must remain concealed in its departmental pigeonholes.

Similarly, in *Reynolds* v. *United States*,[10] the court rejected a broad claim of Executive privilege, holding categorically that it was the court, not the Executive, who had the last word on the question. The Supreme Court, in reversing, expressly declined to consider the broad proposition of privilege raised by the Government, but decided instead on other grounds. Yet it is important to note that, even so, the highest Court was careful to state that the determination of privilege must be made by the Court, declaring expressly, "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers".[11]

Nor are these the only cases rejecting the extreme claim of Executive privilege in courtroom proceedings. In *United States* v. *Certain Parcels of Land*,[12] a condemnation action by the Government, the defendant sought certain internal Department of Justice files. Of course, the Government was quick to claim privilege; but its claim

5. 7 Senate Misc. Docs. 237-43 (1893).
6. 17 Cong. Rec. 2215.
7. *Ibid.* See also 3 Hinds' Precedents 2-3, 85-86.
8. Wigmore on Evidence 790 (1940).
9. 133 F. 2d 470 (9th Cir. 1943), cert. denied, 319 U.S. 752 (1943).
10. 192 F. 2d 987 (D.C. Cir. 1951).
11. *United States* v. *Reynolds*, 345 U.S. 1, 9 (1952).
12. 15 F.R.D. 224.

was not sustained by the court. The court's language is extremely thought-provoking to those who have uncritically accepted the extreme arguments re privilege of the Executive Branch:

> In short the Government's claim of immunity under the Attorney General's regulations does not rest upon any privilege "established in the law of evidence..." The sole ground for the claim is that the documents are "confidential reports in Department of Justice files"; the Government's theory being, as stated before, that "reports in the Department of Justice files" are privileged because made confidential by Order No. 3229 (Revised).
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> *Clearly there is no such privilege known to the law of evidence.* The most that can be said for the Government's position is that there is a general public policy against unnecessary disclosure of files of the executive branches of the Government. However, this policy may readily be outweighed by the public interest in disclosure when such files contain documents of evidentiary value in a court of justice.[13]

Another case along this line is *Zimmerman* v. *Poindexter*,[14] where, in a civil suit for wrongful imprisonment, the plaintiff by subpoena sought to get certain files from the Army including Federal Bureau of Investigation reports. The court there too rejected the claim that it was for the Executive itself to determine what documents to withhold. According to the court, it itself had to make that determination. Said the court:

> We conclude by holding that to sustain the assertion of privilege of concealment under the specific situation before the court would be tantamount to abdicating an inherent judicial function of determining the facts upon which the admissibility of evidence in a case depends. This we cannot do.

Also of moment here is the line of criminal cases where executive privilege has been asserted. These cases have uniformly rejected the Executive claims and have culminated in the recent decision of the Supreme Court in *Jencks* v. *United States*.[15] In *Jencks*, the Court refused to allow Executive privilege to permit even Federal Bureau of Investigation files to be withheld from defendant, even without a showing on his part how the files sought were directly relevant to his defense. The need for justice, said the Court, is greater than any prejudice "attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession".

It is recognized that there are many who do not agree with the *Jencks* decision and that there has, indeed, been enacted a law which seeks to correct its too extreme effects. But can it seriously be contended that a Court which held that a private individual must be given access even to Federal Bureau of Investigation files would refuse to hold that the elected representatives of the people are entitled to at least the same access? Certainly, a tribunal which decided *Jencks* the way it did would be most unlikely to give free rein to the advocates of absolute Executive privilege *vis-à-vis* the Congress.

If the cases reject the claim of a privilege in the Executive to determine what papers should be withheld from a private litigant, how much more should that claim be rejected where the Congress is concerned! It is true that the administration of justice between private litigants is important and is not to be over-ridden except in the face of compelling necessity. In such cases, however, governmental necessities may outweigh the needs of the private parties. The same does not apply to a congressional investigation. Here it is not merely the rights of individual litigants that are at stake. The elected representatives of the people are asserting their need for information on behalf of the nation itself, so that their legislative power may be guided in its exercise by knowledge of what needs to be known. In such a case, can the Executive pull down in the legislature's face the curtain of official secrecy?[16]

It is important to bear in mind that the investigating power of the Congress is one which has its antecedents in centuries of Anglo-American history. The roots of the power lie deep in the British Parliament. Under the leading modern British case; "the Commons are, in the words of Lord Coke, the general inquisitors of the realm . . . they may inquire into every thing which it concerns the public weal for them to know".[17]

**Bernard Schwartz was educated at the College of the City of New York, New York University, Harvard and Cambridge (England). He is the author of several books and numerous articles in legal periodicals.**

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It may be claimed that Lord Coke's famous assertion referred to in this quote is too extreme when applied to our Congress. It has been argued that the British precedent is not apposite because the Parliament was, unlike the Congress, originally a judicial body.[18] More recent scholarship, however, vigorously denies that Parliament ever really was a court in our modern sense of the term.[19] Then, too, the English cases on legislative investigatory authority all arose long after Parliament clearly ceased to be a court. Thus, even if Parliament had once been a judicial body, that should hardly affect the value for us of precedents that took place long after it had ceased to be such.

It is relevant to note that a member of the very first Supreme Court spoke of the investigatory power of the House of Representatives in language strikingly similar to that of Lord Coke. Lectur-

13. *Id.* at 230 (Italics added).
14. 74 F. Supp. 933 (D. Hawaii 1947).
15. 353 U.S. 657 (1957).
16. Compare Taylor, GRAND INQUEST 98 (1955).
17. *Howard* v. *Gosset*, 10 Q.B. 359, 379 (1845).
18. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 189 (1880).
19. See Potts, 74 U. OF PA. L. REV. 692-700 (1926).

ing in Philadelphia in 1791, Mr. Justice Wilson affirmed:

> The House of Representatives . . . form the grand inquest of the state. They will diligently inquire into grievances arising both from men and things.[20]

Can it reasonably be claimed that the "grand inquest" of the nation does not have the broadest investigatory power over the Executive? Congressional powers of inquiry are not limited to those possessed by the courts. The Congress itself has stated that, insofar as its investigatory authority was concerned, it "was in the relation of a grand jury to the Nation",[21] and the Supreme Court has taken a similar position.[22]

Most pertinent in this connection perhaps, is a 1951 Massachusetts decision which arose directly out of an Executive attempt to pull down in the legislature's face the curtain of official secrecy. In 1951, the Massachusetts Development and Industrial Commission (an agency within the Executive Department) ordered a study made of business conditions. When this study was completed and a report made, the state senate ordered the chairman of the commission to produce the report. He refused, asserting that "the legislature may not attempt to interfere with action taken by the executive department". He was backed up in his defiance by a formal vote of the commission directing that the report be turned over to a private advisory group. Thus, there was squarely presented to a court for the first and only time the direct question of whether the Executive can refuse to turn over to the legislature an internal communication on the ground of Executive privilege.

The claimed privilege was wholly rejected by the Massachusetts court, which upheld the power of the state senate to enforce its demand for the report, by contempt proceedings if need be. According to the court:

> If the legislative department were to be shut off in the manner proposed from access to the papers and records of executive and administrative departments, boards, and commissions, it could not properly perform its legislative functions.[23]

It needs little iteration to note the extreme relevancy of this Massachusetts decision. Here we have the only case in which the pretensions of the Executive to a power to withhold documents from the legislature on the ground of official privilege were squarely presented to a court. And the court expressly repudiated the gratuitous assumption of such a power in the Executive to frustrate a legislative inquiry.

At issue in the Massachusetts case was the claimed privilege of the Executive with regard to communications within an Executive agency. It should be noted that these are exactly the communications asserted to be wholly privileged in the President's letter of May 17, 1954, to the Secretary of Defense, which was so strongly relied on by Mr. Rogers.[24] Yet, in the one case where the claimed privilege has had to run the judicial gantlet, it was weighed in the balance and found wanting by the highest court of Massachusetts.

### *III. Separation of Powers*

The separation of powers is relied upon by the Attorney General as the great doctrinal support for the Executive privilege against the Congress. In actuality, that doctrine does not really help us with the problem. The separation of powers was also used by Mr. Rogers' predecessor in justifying the President's letter of May 17, 1954. Each branch, said Attorney General Brownell then, "shall be limited to the exercise of the powers appropriate to its own department and no other".[25] But this begs the question as far as the problem at issue is concerned, for it does not in any way tell us to what "powers appropriate to its own department" the authority of the Congress is limited. The implication is that congressional authority is limited to the enactment of laws; in no other way can it act. Such an interpretation by the Attorney General of the powers of the Congress is, however, wholly out of line with modern theory and practice on the proper role of a legislative assembly in a democratic state.

As that organ of the Federal Government which alone is vested with the power to enact laws, the primary province of the Congress is, of course, to legislate. It would, nevertheless, be erroneous to think of the functions of a modern legislative assembly solely in terms of lawmaking. Important though the legislative function itself may be, a legislative body is hardly worthy of the title of Congress or Parliament if it merely grinds out legislation as a sausage maker grinds out sausages.

As strong a statement as any upon the right of the Congress to obtain the information necessary for informed exercise of its functions is that made for a unanimous Supreme Court by Mr. Justice Van Devanter in the famous case of *McGrain* v. *Daugherty*. "We are of the opinion", reads the decision of the Court there, "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. . . Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised." [26]

In Justice Van Devanter's view, the power to obtain information is included in the grant to the Congress in Article I of the Constitution of legislative power. But, if this view is correct (and it is supported by the authority of the entire Supreme Court), it refutes the constitutional basis upon which the Attorney General's view purports to rest. Even if the separation of powers doctrine requires, as the Attorney General asserts, that each branch shall be limited to the powers appropriate to its own department, that

*(Continued on page 525)*

20. Works of James Wilson 29 (1896).
21. 3 Hinds' Precedents 86.
22. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, (1946).
23. *Opinion of the Justices*, 328 Mass. 655, 661 (1951).
24. Rogers, *supra* note 1, at 1009.
25. Memorandum of Attorney General in support of President's letter of May 17, 1954.
26. 273 U.S. 135, 174-75 (1927).

# The Settlement of Controversies:

# The Will and the Way To Prevent Lawsuits

by **Frank W. Brady** • ***of the Philippine Bar (Manila)***

**"Only when there is absolutely no other reasonable and honorable way should a controversy be submitted to judicial determination." These words summarize Mr. Brady's advice. No one likes lawsuits, he points out, and most people are more than pleased to settle their controversies, if their lawyer can work out just, reasonable terms. He urges lawyers to practice the art of "extrajudicial settlement".**

Agree, agree, says the old saw, the law is costly.

—*Aesop's Fables*

The Spaniards have a most common and practical saying for the guidance of all lawyers and their clients in the settlement of cases out of court or in court: "*Mas vale un mal arreglo que un buen pleito.*" Not as common is its English equivalent: "A sorry agreement is better than a good suit in law." The lesson to learn is to settle—always to discourage litigation. Remember Confucius, who, as Minister of Justice, wisely remarked, "I can try a lawsuit as well as other men, but the most important thing is to prevent lawsuits." To paraphrase the well-known adage, an ounce of prevention is worth a ton of litigation.

### *Can All Conflicts Be Settled Out of Court?*

In the prevention of lawsuits, I have done my little bit; for, in the twenty odd years of practice, I have filed only *six* complaints, five of which were dismissed by compromise before trial. From the sixth suit, I withdrew my representation for ethical reasons. Actually, I have never, either as counsel for the plaintiff or the defendant, tried a case straight through the trial court; and only once have I taken a case to the Supreme Court on certiorari from a ruling of a lower court. What is more, only twice in my professional career have clients left me to engage other counsel for judicial relief. It would seem that I have been kind to the judiciary.

Of course, not every controversy can be settled extrajudicially, no; but almost all, yes. For in the same way that physical nature abhors a vacuum, human nature detests litigation; and this dislike is universal.

"To go to law", runs another saying, "is for two persons to kindle a fire, at their own cost, to warm others and singe themselves to cinders."

### *Three Keys To Settle Disputes*

What, then, is the basis of the settlement procedure? What hidden powers must the lawyer possess to turn conflict into cure? How does he do it? What is the key?

The answer to these questions, the basis of every amicable settlement, is simple enough for statement but most difficult for execution. First, there must be in every single step you take during the negotiations, in everything you do, in every word you utter, what Mr. Justice Jackson called *professional sincerity*, which is nothing else but plain good faith. It is, indeed, the handmaid of persuasion, and without persuasion you settle no disputes.

Secondly, you must master the facts and the law, completely and thoroughly, exactly as you would do to prepare for the trial of a courtroom case. A pitiful neglect on the part of some lawyers to observe this cardinal rule, and to rush blindly into the negotiation of cases without adequate preparation often meets with disastrous results. *Semper paratus!*

Thirdly, and perhaps the most important, is the *will* to settle out of court —the indomitable will of the lawyer to prevent, at all reasonable cost, the case from going to court, and to sincerely search for a solution to the controversy. In the promotion of peace, it is his first duty to exhaust every possible means of settling the controversy out of court; and when I say exhaust I mean it in a thorough sense.

This third rule, in capsule form, is nothing else but tenacity or constancy of purpose, which is the great secret of success in any human endeavor. No, make no mistake, the settlement process is no easy task. It is built on real hard work. Yes, there will be times when, I warn you, caught in the crossfire of conference negotiations, you will be sorely tempted to give up in despair

and let the case drift into court. But don't, for there is almost always a way.

### *Settlement Process Is Like a Medical Case: Watch It!*

Coming next to the nature of the settlement process, I have always regarded a controversy as a medical case, and unless you want the "patient" to die in your office, keep your hand on the "pulse" of the case all the time.

On the two occasions I failed to effect a settlement in my office, and the controversy in each instance blossomed into a full-grown lawsuit, I viewed, in my distress and defeat, that unhappy transition as the emtombment of my client and his case with my poor self standing by as the lone mourner.

### *Justice in Your Own Law Office*

The settlement of a conflict or dispute is also a short cut to justice, and, like most short cuts, the way is rugged. Some lawyers regard this process as a poker game; but not ever having played poker, I fail to note any such similarity. Nor would I liken the settlement negotiations to a legal bargain, since justice is too sacred to be the subject of purchase and sale. Nor are the negotiations, I think, only a matter of give and take. The great art is to make certain that your client does not give more than what his opponent is entitled to take, or take more than what his opponent should rightfully give. That is justice in its finest sense, whether decreed by the law or won at the conference table.

Actually, the settlement of a controversy is justice in your own law office, which to that end is transformed into a trial court, court of appeals and supreme court, with yourself often in the triple role of counsel for your client, counsel for the opponent, and presiding judge of this trinity of tribunals.

### *Advantages of Compromise Are Many*

The advantages arising from the settlement process are so obvious and so numerous that I cannot understand why more lawyers, especially the younger lawyers, do not make full use of the extrajudicial procedure. Precisely, this article has been written to encourage my brethren to venture into that field. I repeat: only when there is absolutely no other reasonable and honorable way should a controversy be submitted to judicial determination. I cannot make this plea too strongly.

The advantages of an amicable settlement, compendiously stated, are:

1. Extrajudicial justice moves faster and is far cheaper.

2. It saves much mental anguish and heartache to the lawyer and to his client.

3. It often reconciles the disputing parties.

4. It is generally more satisfactory.

5. In the settlement of a case in your office, *you* are the judge to a great extent.

6. Also, with your client's approval, you have the choice to accept or to reject the final "decision" reached at the conference table.

7. You can handle more work when you settle cases out of court.

8. You attract more clients, as more clients prefer to settle than to litigate. As soon as word gets around that you "specialize" in keeping clients out of court, your success in the profession is assured.

9. Extrajudicial justice generally operates under a mantle of secrecy, unlike judicial justice. It thus keeps your client's name away from unnecessary (sometimes unpleasant) publicity.

10. You and your clients make fewer enemies by settling than by fighting in court.

11. Judges like you all the more for sparing them hard work; and, without being aware of the fact, you gain their respect and admiration.

### *Disadvantages Are Only Two*

The disadvantages of settling cases extrajudicially are few. I can think of only two, namely:

1. Your fee per case is less, usually by about 30 per cent. However, this diminution of income is in part compensated by the increased volume of work that streams into your office.

2. Strange as it may seem, you work harder at the settlement of disputes. As I have previously observed, there is nothing more trying and tiring than the settlement of cases extrajudicially.

### *How To Succeed in Settling Cases*

Next, we come to the "procedure" of settling controversies out of court or in court. Drawing from my own limited experience, and encouraged by the thought that I may be of some assistance to my brethren, especially the young lawyers, I venture to give you the following hints in a suggestive and not absolute manner:

1. Go at once to the enemy camp! Unorthodox as this procedure may strike some lawyers, do so. And I mean by this, go immediately to your client's opponent in his own home grounds. Tell him frankly that you have been retained by your client and that you are there to find a reasonable way to settle the dispute out of court, adding that as soon as possible you will study the facts of the case and will see him again—soon.

That first visit, if handled skillfully, will be of lasting value. Remember that first impressions count. Besides a personal introduction to your client's opponent, it will give you a command, as it were, over the case that will stay with you until the end—*if* you are fair in the negotiations. To your great surprise, your client's opponent will talk to you from his heart in a way that perhaps he will never do again. Also, that first conference will give you the "lay of the land" of the conflict—the point of view of the opposition, spontaneous and unadulterated. In many, many cases, that visit will prevent the opponent from engaging counsel; so he will, surprisingly, entrust himself to you and, what is more important, to your judgment. Nobody wants to spend money on lawyers unless he has to.

On this first visit, your client should stay away, and you should go to see his opponent *alone*. Try never to depart from this rule.

2. Keep an office diary and record minutely the negotiations. True, your entries are barred as self-serving, but, just the same, they will serve you well. This habit will pay good dividends. I have seen it in my own case.

3. Call for a truce while the negoti-

ations are under way. No pleadings or motions of any kind should be filed. Maintain the status quo.

4. Meantime, marshal the facts, which are always difficult to garner, for they all happened in your absence and in the past. It is a process of reconstruction; it is not easy. As John Stuart Mill said, "He who knows only his side of the case knows little of that." Study the applicable law, too, and never overlook the importance that it plays in extrajudicial justice. I have always regarded the facts of a case as the hull of a ship, and the law as its rudder. It takes the law to *steer* the facts through the tedious negotiations of a successful settlement. I am not telling you that one is more important than the other; I am merely warning you not to prescind from the law in this field of justice.

5. Take your client along with you wherever you go, except, as already noted, on your first visit to his opponent. This will help in the negotiations, in gathering the facts and getting a good insight into the nature and ways of your client's adversary. Moreover, and very important, it will make collection of your fee easier, since your client is familiar with the ups and downs of the negotiations. Otherwise, when he receives your bill, he may exclaim, as so many clients do, "But you did very little. Why, you didn't even enter an appearance in court!"

There is another decided advantage in taking your client around with you as you labor on his case. For one thing, he sees for himself the difficulties encountered by you in handling his case, and he thus grows more receptive to a settlement and less inclined to a lawsuit. In fine, he learns to appreciate the worth of your work.

6. Of course, there will be clients whom you should keep out entirely of the negotiations for tactical reasons. You alone should be the judge of this. In the same way as years ago children were seen but not heard, I have found it most helpful to have my client at my side but always "as voiceless as a Turkish mute".

7. If your client's adversary wishes you to act as his counsel as well—and this happens often—tell him the truth: that it is very hard to serve two masters and be loyal to both; that you will try to do so and will go as far as you can until you feel that you cannot continue any longer. In most cases, he will let you handle his side as well Of course, if your client's adversary is represented by counsel, I need not tell you what the rule is then.

8. Demolish all opposition and never lose heart Be patient, tolerant and persuasive. One little word, spoken out of turn or thoughtlessly uttered, can bring the negotiations to an abrupt and tragic end. I have seen this happen. Again, I caution you to keep your client voiceless.

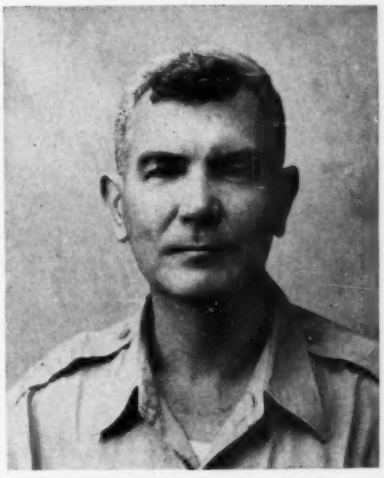
9. The hardest case to settle, you will find, is that in which your client's adversary has *no* case, and feels that he has nothing to lose and perhaps something to gain by going to court. Your only weapons then are two—persuasion and prayer. Don't ever compromise with such scoundrels. Don't settle with them to get rid of "nuisance values". When confronted with the facts and the law, they usually change their minds and drop their cases. If, however, they should dare go to court, give them a legal lashing.

10. On appropriate occasions be forceful and, if necessary, even a little theatrical—in all sincerity, of course. As Swift said, "the greatest art is to hide art".

11. If you find that your client is overbearing as to what he wants to settle the case for, suggest that you wish to withdraw so that he may engage other counsel. In the great majority of cases, he will not let you go and will be guided by your advice.

12. If, despite all Trojan efforts on your part, the conflict should go to court, or is already in court when your services are retained, make use—real use—of pretrial. It is effective. And remember in this connection that even after the decision of the trial court, when the case goes up to the appellate levels, settlements are sometimes made by the exhausted parties; for, as another saying goes, "Suits at court are like winter nights, long and wearisome." And, you can add to this, costly!

13. One word of advice on fee contracts: Make certain to provide in each contract what your fee will be in the event of a settlement, otherwise you may bitterly regret the omission. There is nothing like clearing the financial decks before you start working on each case.



**Frank W. Brady has been in solo practice for many years in his native Manila, Philippines. He is a member of the Philippine Bar Association, as well as a member of the American Bar Association. He was graduated from the University of the Philippines in 1926 (B.S.C.) and from the Philippine Law School in 1934 (LL.B.). With the exception of one short trip to the States a few years ago, he has lived all his life in the Philippines.**

### *Try To Avoid These Pitfalls*

On pain of making this article longer than what I had originally planned, I beg to include before closing a list of "don'ts" and "nevers" which may be of assistance in the settlement of cases. And again, I suggest and do not decree.

The list of "imperatives" is as follows:

1. Don't ever try to settle a case over the telephone. I never settled one that way but came near bungling some by departing from this standard rule. There is no substitute for a face-to-face talk. That is why television was invented!

2. Never write a threatening letter to your client's adversary or his lawyer.

3. Never, never, file a complaint

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## *The Common Law in America*

The importance which the law has had in the establishment of sound political structures in the English-speaking world will be emphasized by the Virginia State Bar when it commemorates the advent of the common law at Jamestown on May 17, 1959. This ceremony will recognize the role of the common law in the Jamestown settlement of 1607; the subsequent development of the Commonwealth of Virginia, and the part it has played in the growth and development of the other twelve colonies, which later became thirteen states, soon to be expanded to fifty. The English common law has been predominant in at least forty-nine of these states and has played its part well in serving as a solid foundation upon which the political and judicial structures of these states have been built. The importance of the law in the development of our American democracy was recognized on a national scale in the first Law Day—U.S.A. last year, and was repeated this month. A wider recognition of the value of law and the part it can play if the world is to enjoy a cessation of the cold war and hope for a peaceful existence is being emphasized in the regional meetings held in various sections of the United States under the auspices of the Special Committee on World Peace Through Law of the American Bar Association. The Commonwealth and the State Bar of Virginia are participating in the Jamestown ceremony. The people of the United States, its lawyers and judges, will join in wishing them well. We are all heavily indebted to the Colonial Fathers who laid the foundation at Jamestown some 350 years ago. The light of the English common law has spread throughout the length and breadth of this great land of ours, which now extends far into the reaches of the Pacific.

## *The Founding Fathers*

No adult American is living today in the world into which he was born. Times change, as all but the die-hard will admit. The most difficult of all mental adjustments to make is to rearrange a familiar group of data, and to free oneself from the comfort of familiar doctrine. Most of us have the human tendency to judge by our own experience, knowledge and prejudices rather than by the light of new facts, new evidence or by the cogent logic of evolving circumstances. Lawyers and judges are not immune from this psychological tendency to resist new ideas.

There is in all of us this conservative tendency to attack radical innovation. Most of us either run away from the innovation or fight the intruder. Our choice of words as lawyers usually reveals whether our attack is on an emotional or a more mature, intellectual plane.

Frequently the venerable authority of the Founding Fathers is appealed to as a justification for maintaining our comfortable *status quo*. If there is one doctrine which the Founding Fathers intended to incorporate in our Federal Constitution, it is the idea of flexibility, of adaptability to future conditions.

Chief Justice John Marshall is often quoted by lawyers to the effect that, "We must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

No one has expressed the necessity of adapting our Constitution to the vicissitudes of an expanding democracy better than the draftsman of our Declaration of Independence, Thomas Jefferson. Jefferson wrote to Samuel Kercheval in 1816 as follows:

> Some men look at constitutions with sanctimonious reverence, and deem them like the Ark of the Covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of bookreading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new

truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. It is this preposterous idea which has lately deluged Europe in blood. Their monarchs, instead of wisely yielding to the gradual change of circumstances of favoring progressive accommodation to progressive improvement, have clung to old abuses, entrenched themselves behind steady habits, and obliged their subjects to seek through blood and violence rash and ruinous innovations, which, had they been referred to the peaceful deliberations and collected wisdom of the nation, would have been put into acceptable and salutary forms. Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs.

If we are to do justice to the great questions facing us today as a nation, we must decide them in the light of existing conditions. Change is the inexorable law of life. Within the framework of our Constitution we have proved the flexibility and adaptability of our American democratic system. We have every reason to believe that with each branch of our tripartite government functioning within its allotted sphere, we can successfully meet the challenges of the future. Our generation, too, must have the courage to face the facts which are facing us. Our generation, too, can and must govern itself. This is a bit of wisdom from one of the Founding Fathers that we can wisely apply today and tomorrow.

# Editor to Readers

*For many years we have followed with interest the development of the work of the American Law Institute in its* Restatement of the Law, *in which so many of our leading members have so actively and effectively participated as members of the Institute. We have recently received a statement from Mr. Harrison Tweed, of New York City, President of the American Law Institute, pointing out with clarity the purposes and value of the original* Restatement *and the objectives in the* Restatement, Second.

*We are glad to present here this word from him in which we most heartily concur:*

When, in 1923, the American Law Institute undertook to restate the principal subjects of the common law, the thought was that a combination of scholarly analysis from law school professors and practical experience from Bench and Bar, could produce a work which would do much to alleviate the two major defects of the law—uncertainty and complexity. There was much debate as to the form and theory to be followed and the final decision was to state categorically what appeared to be the consensus of the decisions of our courts. The value of the product has been demonstrated by the sale of something like 433,000 volumes, including those in the Student Edition, and by 27,500 court citations.

Since law grows and law books become obsolete, a new edition of the *Restatement* is needed and is being brought out as *Restatement, Second*. It will be in much the same form as the original but a good deal will be added in deference to suggestions from both those within and those outside of the Institute. There will be less reliance upon the black letter, such as statements that "this is so and no questions are to be asked". There will be more explanation and elucidation. The Reporters are adding notes with citations and discussions of authorities where points are difficult or decisions conflicting. Court citations of each section will be listed and there will be references to the American Digest System and American Law Reports Notes. These changes should make the *Restatement* more useful and workable in the hands of both lawyers and judges but should not diminish its authority—rather the contrary. The *Restatement of Agency*, of which Professor Warren A. Seavey was Reporter, has been on the market for six months. The *Restatement of Trusts*, under the Reportership of Professor Austin W. Scott, will appear very soon. Others will follow it, with *Conflict of Laws* and *Torts* heading the list of subjects.

The profession should be grateful to the American Law Institute and to all the professors, judges and practicing lawyers who have given so generously of their time and learning. The *Restatement* not only helps judges and lawyers to solve the current uncertainties which confront them but tends substantially to reduce the number of uncertainties which will face them in the future.

# Help Wanted:

# Operation Simplification

**by Daniel Partridge III • *of the District of Columbia Bar***

**In this article, Mr. Partridge, the Chairman of the Section of Real Property, Probate and Trust Law's Committee on Simplification of Security Transfers by Fiduciaries, asks for support of the Uniform Act for Simplification of Security Transfers—a matter, he notes, that is at least as important as D-Day. Mr. Partridge's vigorous style makes his article entertaining as well as informative.**

*Summary of Article:* There is a Uniform Act which will simplify security transfers by fiduciaries! Help!

Some misguided people think that Operation Simplification is not as important as the invasion of Normandy on D-Day or the enlargement of the World Court to decide all disputes between nations. But, to the large group of general practitioners who have, at one time or another, had to arrange for the transfer of a large number of stocks in a small estate, these people are dangerous iconoclasts who should be outlawed along with Communists and other subversive groups.

There is a smaller group which is also enlightened. This is the group of American Bar Association members who have nursed this child at their bosoms (all male) and warmed it with their hearts' blood until it has become the lusty adult that it is today.

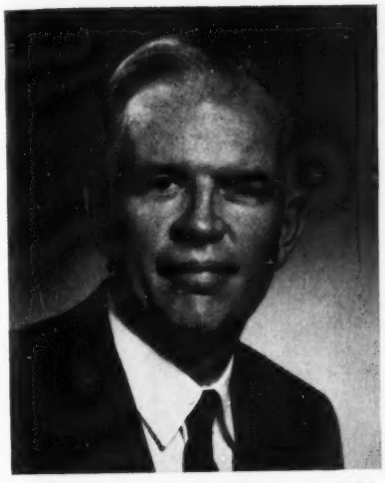
In our mother country, England, it has always been, since corporations began, that the transfer agent and the corporation had no duty to investigate a transfer of stock by a fiduciary to see whether or not that fiduciary was exceeding his powers or violating his trust.

It has taken us several generations of naughty swear words and nervous breakdowns to find out that mother knows best.

The young practitioner bounds to the Bar with joy in his heart and a song on his lips. One of his first clients is Widow Jones, whose husband left very little, but most of it in registered stocks and bonds. Humming a gay tune, he gets his letters of administration, has his certificates of stock endorsed by the administratrix and naïvely sends them to the various transfer agents for transfer. Soon he gets a two-page mimeographed list of requirements from a transfer agent with certain requirements checked. Then these lists pour in, in all shapes and sizes and with varied requirements. Some time later, as he steps into the clerk's office to file his petition for voluntary bankruptcy, his back is bent and his brow is sad—he is a broken man.

This situation has little adverse effect in the large estate. The senior member of the firm can refer the matter to a harassed junior and go out and play golf, serene in the knowledge that the fee will pay for the time to satisfy the requirements of the transfer agents and keep him in champagne besides. But in the small estate, guardianship, committeeship or trust, the time the attorney spends is often of more value than that of the stock transferred. Bear in mind, in this connection, that the documentation necessary to transfer one share of stock is as much as the documentation for one thousand shares. And it is usually more difficult to meet the requirements for transfer in the small communities than in the big cities. The lawyer is the whipping boy, and the country lawyer the chief whipping boy, for he cannot charge his client full value for two reasons: His fee is usually limited by a percentage of the value; and no one has yet devised a method of charging a client more than the amount involved and sleeping easy afterward (or collecting).

Small purchases of stocks have multiplied enormously in late years and the situation is getting worse by leaps and bounds. American Telephone and Telegraph has more than 1,600,000 shareholders. More than half own a small number of shares. Last year they handled 40,000 fiduciary cases and expect to handle 43,000 this year. Most of these fiduciary transfers involved two, three or four shares. It is estimated that the papers examined last year regarding these transfers would make a pile as tall as the American Telephone and Telegraph head-



**Daniel Partridge III received his preliminary education at Washington College, Georgetown University, and his legal education at the Washington College of Law. He was admitted to the Bar of the District of Columbia in 1929, of Virginia in 1934, and of Idaho in 1954.**

quarters building at 195 Broadway.[1]

At this point, if thoroughly brainwashed, I would admit that the above is slightly exaggerated—or at least paints the picture in rather grandiose strokes. Even the American Telephone and Telegraph statistics are a little out of kilter. That stock is not entirely typical of the other stocks on the market. However, there is basic truth in everything that has been said. A fiduciary has to go through the process of transferring his stock or bond before he can contract for sale and this may take some time. An individual can pick up the telephone, call his broker and sell his stock at the market without further ado. But the fiduciary, who has a greater duty to conserve than an individual, has to go through all the red tape of transfer before he can do this. This situation can cause substantial losses to a fiduciary selling in a falling market that he would not incur were he operating as an individual.

After many trials and tribulations we now have a Uniform Act which simplifies fiduciary transfers by going back to the English rule and providing that there shall be no duty of inquiry into the rightfulness of a fiduciary transfer on the part of the transfer agent, or the broker or bank guaranteeing the fiduciary's signature.

This puts the burden of providing for protection against the dishonesty of a fiduciary where it should be—on the person or court appointing the fiduciary. This seems fairer than the present system where the transfer agent, who has no right to say anything about the provisions of the instrument of appointment or the bond of a fiduciary, bears some part of this burden and the innocent attorney for the small estate, trust, guardianship, committeeship or conservatorship, bears another and greater part. Moreover, the evidence seems to indicate that the policing of the transfer agent does very little to prohibit dishonesty. Out of the thousands of fiduciary transfers of their own stock handled by United States Steel and American Telephone and Telegraph not one case of dishonesty has recently been disclosed.[2] A fiduciary who is inclined toward larceny can usually sell his stock and appropriate the proceeds.

The Uniform Act has the blessing of representatives of the transfer agents. This is vital. There has been a so-called Simplification Act in force in about half the states since 1922. However, it has not simplified because the transfer agents would not honor it for fear of liability to beneficiaries.[3]

The legislative history of the present Uniform Act would make the blood race faster through the heads of some of our readers and act as a gentle, but effective, soporific to others. The tortuous travels of the simplification idea rival those of Ulysses. Only the highlights will be touched upon here (for fear that my readers would stop reading). After the mirage of 1922 had faded, Ohio,[4] Pennsylvania,[5] and Wisconsin,[6] passed simplification acts which had some simplifying effect. Later the American Bar Association resolved to the effect that there was a need for simplification legislation. The Committee for Simplification of Security Transfers by Fiduciaries of the Probate and Trust Section was formed pursuant to that resolution. The Committee approved a model act. In 1957 the Model Act was passed in Delaware,[7] Illinois,[8] and in modified form, in Connecticut.[9] It seemed to do the job and was accepted by Illinois transfer agents where it was in force in three places of control; *i.e.*, state of incorporation, place of transfer, and situs of estate or trust.

However, problems arose in connection with universal adoption of the Model Act and, to make a long story short, the present Uniform Act was approved for universal enactment after much debate and many consultations. It is substantially similar to the Model Act in many respects.

It is clear that universal enactment of the present Uniform Act is desirable to avoid problems of conflict of laws and afford simplification. The sponsors of the Uniform Commercial Code have drafted amendments which will fit the Uniform Act to the Code.

A joint committee has been recently formed to co-ordinate the efforts of those interested in enactment. The joint committee includes representatives of the National Conference of Commissioners on Uniform State Laws, the Probate and Trust Section Committee, and the New York Stock Exchange. Those willing to aid enactment in the various states and territories will please write to: William R. Lynch, Post Office Box 212, New York 5, New York, representative of the joint committee, from whom a copy of the Uniform Act may be procured.

1. Testimony of John J. Scanlon, Treasurer, American Telephone and Telegraph, before New York Legislative Committee at Albany, March 5, 1958. Transcript, pages 76, 77.

2. Testimony of Benjamin L. Rawlins, Secretary, U. S. Steel Corp., before Legislative Committee at Albany, March 5, 1958. Transcript, page 74; Mr. Scanlon's testimony, Transcript, page 80.

3. In 1922 the Conference of Commissioners on Uniform State Laws approved the Uniform Fiduciaries Act, now in force in about one half of the states. Section 3 of this Act was designed to simplify fiduciary transfers. The medium employed for this purpose was a limitation of liability for fiduciary transfers to cases where the transfer is made with "actual knowledge" of a fiduciary breach or "knowledge of such facts that the action in registering the transfer amounts to bad faith". See Title 28, §2303 District of Columbia Code (1951 edition). However, transfer agents are large corporate organizations and some have branches in different states. There is, therefore, a possibility of "knowledge" because of some documents actually forgotten. Transfer agents have not been willing to rely on this Act and insisted on documentation that causes quite a burden in the administration of estates and trusts. *Harris* v. *General Motors Corp.*, 263 App. Div. 261, 32 N.Y.S. 2d 556 (4th Dept. 1942), affirmed, 288 N. Y. 691, 43 N.E. 2d 84 (1942); *First National Bank* v. *Pittsburgh Ry.*, 31 F. Supp. 381 (E.D. Pa. 1939); *Daily* v. *Universal Oil Products Co.*, 76 F. Supp. 349, 371 (N.D. Ill. 1947).

4. Ohio Rev. Code (Page, 1954) §§1339.02, 2109.29; id. (Supp. 1957) §1701.28.

5. Pa. Stat. Ann. (Purdon, 1954) Title 12A, §§8-401 to 8-404.

6. Wis. Stat. Ann. (West, 1957) §180.55.

7. Del. Laws 1957, S.B. No. 287.

8. Ill. Rev. Stat. c. 32, §§439.50 to 439.57, effective September 1, 1957.

9. Conn. Pub. Acts 1957, No. 573.

# Third Annual Meeting of The Fellows

**John C. Leary** • ***Deputy Administrator and Librarian of the American Bar Foundation***

Reflecting well their interest and enthusiasm in legal research, The Fellows of the American Bar Foundation, together with their ladies, turned out almost 450 strong for their Third Annual Meeting, held in Chicago on February 21-22. It is through sponsorship by The Fellows, whose membership is distributed equitably throughout the states according to lawyer population, that the American Bar Foundation is able to undertake a substantial number of its research projects. Organized only four years, this group of distinguished lawyers, through their common bond, have engendered a warm and close comradeship which was highlighted by the stimulating two-day program.

For The Fellows and their ladies who were in Chicago by the afternoon of February 21, special buses were provided to transport them from the Edgewater Beach Hotel—the site of the meeting—along scenic Lake Shore Drive to the American Bar Center. After touring the building—which is the home of the American Bar Foundation—they were served refreshments.

The Annual Banquet, which was preceded by a reception, had as its featured speaker Henry R. Luce, Editor-in-Chief of *Time, Life* and *Fortune*. (See page 482.) In recognition of Mr. Luce's continuing endeavor to help effect world peace through law, the Fellows presented him with a special citation which reads as follows:

> As one of the most influential editors on the American scene, you have long recognized the importance of the rule of law in the affairs of men. You have been a vigorous and articulate advocate of the global extension of the rule of law as a medium for the settlement of international disputes. The frequently expressed conviction in your editorial columns that the legal profession should provide the leadership for the achievement of this goal has served both as an impetus and inspiration to the organized bar.
>
> For your forthrightness and persistence in striving to attain our common objective, a just and durable peace, we, The Fellows of the American Bar Foundation, salute you.

Oscar & Associates, Inc.

**Three of the recipients of citations at the Annual Banquet of The Fellows of the American Bar Foundation are shown above with David F. Maxwell, President of The Fellows. Left to right are Henry R. Luce, John C. Cooper, Mr. Maxwell and Herbert W. Clark.**

Musical entertainment at the banquet was provided by the cast of the famed Chicago Bar Association's "Christmas Spirits" show.

Honorary memberships were conferred upon two lawyers who have demonstrated their outstanding devotion to the law and community service: Edmund D. Fulton, Minister of Justice and Attorney General of Canada, and Hugh D. Scott, Jr., United States Senator from Pennsylvania.

Mr. Fulton's citation states:

> Called to the Canadian Bar in 1940, after graduating as a Rhodes Scholar from St. John's College, Oxford, you have won fame as a successful barrister not only in your own Province of British Columbia but throughout the length and breadth of the Dominion.
>
> After service in World War II with the Seaforth Highlanders and the First Canadian Division, you were chosen to represent your native province in the Canadian Parliament where you quickly rose in the ranks of the Progressive Conservative Party.
>
> We welcome you to membership in The Fellows of the American Bar Foundation not only as Minister of Justice, Attorney General, Privy Councillor and Queen's Counsel of Canada, but as a leader of the Canadian Bar.

Senator Scott was cited in the following language:

> As a member of the Bars of the Commonwealths of Pennsylvania and Virginia, you have at all times maintained the high standards of the legal profession not only as a public prose-

cutor in Philadelphia but as a representative of Pennsylvania for seven terms in the Congress of the United States. Furthermore, you have demonstrated your love of your country by two years of commendable service in the Armed Forces of the United States during two world wars, finally achieving the rank of Commander in the United States Navy.

Your years of public service have earned for you the acclaim of your fellow countrymen and have brought you to the high office you now hold as United States Senator from Pennsylvania. We are proud to welcome you to honorary membership in The Fellows.

John C. Cooper of Princeton, New Jersey, was honored for his outstanding research in law and government. His citation, which was presented by E. Smythe Gambrell, lists these accomplishments as follows:

Admitted to practice law in Florida in 1911, you rapidly earned the esteem of your fellows and were elected President of the Florida Bar Association in 1931, for which Association you previously organized and edited the Florida Bar Journal. By reason of your scholarly and continuing research work you have achieved a worldwide reputation as a preeminent authority in the fields of American citizenship and aeronautical law, including particularly the legal problems involved in the exploration of outer space. You have rendered distinguished service to the American Bar Foundation both in its planning stage as a Member of its Research and Library Committee and also as its first Administrator in formulating the policies for the conduct of the Foundation's Library and Research activities.

You have demonstrated your ability to convert your genius for research into an active program for legal scholars by your performance as a member of the Institute for Advanced Studies at Princeton, as Director of the Institute of International Air Law at McGill University, and as a Member of the Advisory Committee of Princeton University's Woodrow Wilson School of Public and International Affairs and the Fletcher School of Law and Diplomacy at Tufts College.

Although your present position as Legal Adviser to the International Air Transport Association has been extraordinarily demanding, nevertheless you have found time to keep in close touch with the activities of the American Bar Foundation and to give it continuously the benefit of your advice and counsel for which the legal profession shall be forever grateful.

Herbert W. Clark, a San Francisco attorney, was awarded The Fellows' annual citation for having adhered to the highest principles and traditions of the legal profession and for his service to his community, as a lawyer in practice for more than fifty years. Presented to him by Loyd Wright was a certificate reading as follows:

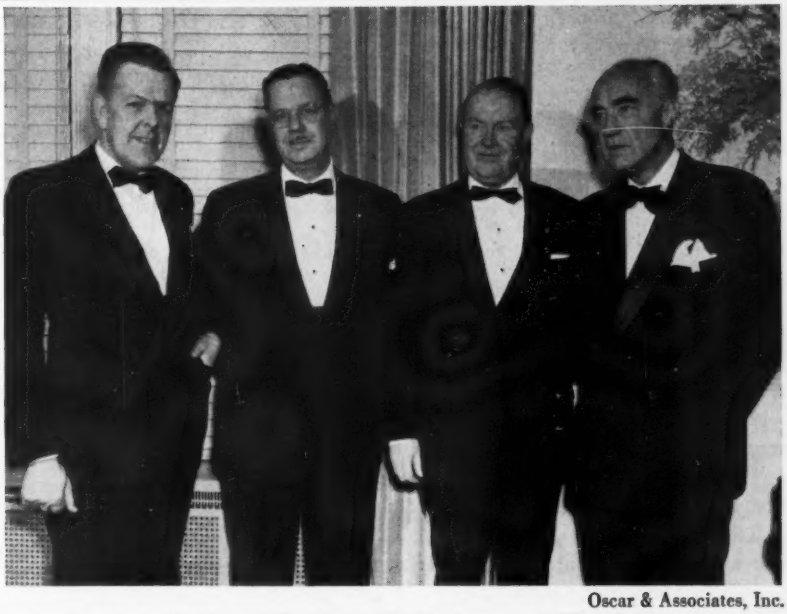
Admitted to the Bar of the State of New Mexico in 1908 and to the State Bar of California in 1917, you have extended the influence of your determined convictions far beyond any single city or state. Your marked regard for the true objectives of our profession has been evident throughout your years of activity in the Section of Legal Education and Admissions to the Bar and your work on the Council of the Survey of the Legal Profession. You have pioneered especially in the Legal Aid and Voluntary Defender movements. Your example of civic responsibilities cheerfully undertaken and successfully discharged have brought distinction not only to you but have reflected credit upon the whole legal profession.

Following the official breakfast on Sunday morning David F. Maxwell, who presided over all meeting events, called to order the annual business meeting. He introduced the officers of the Foundation: Ross L. Malone, President; Sylvester C. Smith, Jr., Vice President; Joseph D. Calhoun, Secretary; Harold H. Bredell, Treasurer; and John C. Leary, Deputy Administrator and Librarian.

Pursuant to a request by the Foundation's Board of Directors, The Fellows elected a special advisory committee to sit with the Directors for the purpose of lending its expert knowledge of research to the deliberations of that body. Although the committee does not have voting privileges, its assistance is vital to technical matters of research.

Elected as officers of The Fellows for the coming year were: Charles S. Rhyne, immediate past President of the American Bar Association, Chairman; Ross L. Malone, current President of the American Bar Association, Vice Chairman; and William T. Gossett, Secretary.

The final event of the meeting was a combined Fellows-National Conference of Bar Presidents' Luncheon held on February 22. Jointly presiding with Mr. Maxwell was Karl C. Williams, Chairman of the Bar President group. The feature of this event was a stimulating address by the newly elected honorary member Senator Hugh D. Scott. (See page 480.)



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**Appearing with David F. Maxwell, Chairman of The Fellows, are the honored guests at the Third Annual Fellows Meeting: (from left to right) Edmund D. Fulton, P.C., Q.C., Minister of Justice of Canada; Hugh D. Scott, Jr., United States Senator from Pennsylvania; Mr. Maxwell; and Henry R. Luce, Editor-in-Chief of *Time*, *Life* and *Fortune*.**

# The Other Gap:

# A Flaw in Our National Character

by Hugh D. Scott, Jr. • *United States Senator from Pennsylvania*

**Addressing The Fellows of the American Bar Foundation during the Midyear Meeting last February, Senator Scott called attention to the deeply disturbing implications of the behavior of some Americans taken prisoner during the Korean War. The root of the difficulty, Senator Scott thinks, lies in failure of education in the home and in our schools.**

Congressional and public interest in the progress of the missile programs of the U. S. and the U. S. S. R., increases in intensity. What it will cost to close the "missile gap", how long it will take, what procedures to follow, who's right, who's wrong—no current topic sparks more discussion, be the locale bar meetings, Bar Harbor or barrooms.

That this gap exists, few will deny. Yet how many are aware of a far more menacing, infinitely more dangerous gap in our long range national security planning?

The closure of the missile gap is basically a matter of how much we are prepared to spend to maintain our security through fully adequate, deterrent and retaliatory forces. This, of course, involves considerations not limited to, nor by, numerical quantity of weapons.

What of this other gap? It is not one which can be bridged in a year, perhaps not in a dozen years.

Let us look at what befell us. Our country entered the fifth decade of our century rich, bounteously blessed, lolling at the wide end of the biggest cornucopia in the world. Then, seemingly all at once, and out of context with our proud national history, we developed a flaw. A flaw which could widen into a crevasse.

*In Every War But One,* as a recent book of that title by Eugene Kinkead (Norton Press) records, our Armed Forces presented no problem of loyalty, caused no concern in the country as a whole regarding the conduct of the individual American when a prisoner of war. "That one war was the Korean war."

Oddly, and without precedent, not a single American prisoner of war managed to escape, for the first time in any of our wars.

Twenty-one Americans elected to remain with the enemy.

This in no way derogates from the courage, devotion and magnificent conduct of most American fighting men in Korea, but what of the fact that over one third of American prisoners of war "collaborated" to at least a minor degree with the Communists, and about 13 per cent became active collaborationists?

What went wrong?

Captain L. S. Robinson, USN, says "it was lack of home training, loose standards, the idea of the fast buck, the quick deal." He lays the blame also to the almost total disregard of authority and to the unpopularity of the war.

I think it goes much deeper than that, especially when we consider the success of Red Chinese "indoctrination" tactics. I used the term indoctrination rather than "brainwashing" since the Army's definition of brainwashing is a process producing obvious alteration of character whereby the subject ceases to be the same personality he was before. There is no real evidence of the use of the kind of severe measures required to effect a change of personality. What was accomplished here, was rather a change of viewpoint whereby Americans were persuaded to adopt the enemy's propaganda as their own. Incidentally, while there is plenty of evidence of disciplinary cruelty, there is not a single documented case of cruelty being applied in the indoctrination of prisoners. The method used was an alternation of leniency with pressure, the continued, relentless repetition of plausible, seemingly factual statements.

### *Communist Techniques . . . Harassment and Humiliation*

The techniques used by the Chinese Communists were repetition, harassment and humiliation. Prisoners were required to "cram" on Chinese literature and were constantly examined on Communist ideology day in and day

out, week in and week out. As the author of the book I have referred to states: "The technique of harassment was equally successful... of the three tactics, the third, humiliation, did the most psychological damage." Although prisoners were specifically promised leniency, any prisoner who questioned a point of Communist doctrine during a lecture period was required to remain seated and the entire class of his fellow prisoners ordered to stand and remain on its feet until the objector had abandoned his objection. This led the other prisoners after hours of standing to complain and mutter against the objector and ultimately led to his capitulation. The prisoner was then required to read a long self-criticism ending with an abject apology to the class. The instructor followed up with a period wherein his classmates were ordered in turn to criticize him, which they did. He then was made to criticize his classmates. This technique ultimately led to complete distrust of each prisoner by every other prisoner and the effect on morale was obvious.

Why were these arguments effective? They were effective because our soldiers had little or no grounding in American foreign policy, little interest in current events and wholly inadequate grounding in American history or the basic tenets of the individual's duty to his country.

Were these American soldiers incapable of learning? True, many had immature minds and some had not gone beyond the fifth grade. But they returned to the United States able to recite long passages from Karl Marx from memory, they had studied the theoretical writings of Lenin and Stalin until they could argue the merits of Communism and its superiority to democracy with some of the best educated Army interrogators. It ought to be added here that many of the collaborators came from the ranks of those who were bright and who had had an average or better than average education. Indoctrination therefore was successful to some degree in all groups and the degree of education was evidently not the controlling factor.

### *"The Fault Lies in Ourselves"*

There has been failure in depth here, on the part of teachers and public officials. Failure in home training played its part too. Too many young soldiers had been "indoctrinated" before they ever landed in Korea, in the belief that it's what you get, not what you give, that counts. "The fault, dear Brutus, is not in our stars, But in ourselves that we are underlings."

The growth of governmental paternalism, the promise to vote benefits out of the pockets of some people into the pockets of others, the concept of America as the "Lady with the Ladle" rather than the "Lady with the Lamp", these ideas had found fertile ground in the minds of young men who had never been taught to honor sacrifice, to respect unselfishness, to feel devotion to a cause, to love one's country, to cherish the memory of those who died in all our wars for freedom's cause.

Those who faltered were the "beat" of this generation. There were so many more who met their duty and their destiny with gallantry and patriotism.

But those who failed are a charge upon our conscience, a warning of signs of decay among us, a peril to our future security. "He that cannot think is a slave; he that dare not think is a coward; he that will not think is a bigot."

Before patriotism goes out of style, should we not busy ourselves with some wise remedial planning?

I believe we must, through state and local programs, re-examine and drastically overhaul our present methods of instructing our youth, in grade school, high school and college. Here is a quotation from an interesting letter written by a college girl which appears in the March issue of the *Atlantic Monthly*: "My academic preparation had included work on the school annual, student service in the school library, traffic laws and safety, courses in poise, and a culture course that somehow never went beyond 'young person's guide to the orchestra'." One wonders whether the high school in question had any courses in American history, civics, government, and one may be permitted to wonder also what textbooks may have been used. The Federal Government likewise should re-examine its Armed Forces' indoctrination and orientation programs, even though there has been progress in this area in the past five years.

We need unremitting emphasis on the origins of our nation, on what made it strong and great and kept it free, upon the fundamentals of our national purpose.

I should like our schools to stir our students to love of country, to prepare them to counter the washers of brains with undeviating faith founded upon knowledge of our country's principles and policies, with the sturdiness of their conviction in the justice of our country's cause. And if this be "propaganda", I should also like our Armed Forces to employ much more of it.

Nor is it sentimentalism which leads me to suggest that I should like to hear again in the classrooms of America the stirring stories of our clearing of the wilderness, the wintry tale of the agonies of the men of Washington at Valley Forge, the gallantry of Ticonderoga, Antietam, Château-Thierry and Iwo Jima.

I should like to hear again in the classrooms of our Republic the rolling cadences of *Hail, Columbia!*, *The Battle Hymn of the Republic*, *The Halls of Montezuma*. I should like to be assured that from these, our halls of learning, our sons and daughters depart with the chambers of their minds filled with the "beauteous and pleasant riches" of wisdom, tolerance and patriotism. So armed, they will meet and conquer the menace of any Red schoolhouse.

These things I should like.

And so, I think, would you.

# The Way of the Law:

# The Road to the Mountains of Vision

by Henry R. Luce

**A speaker at the annual dinner of The Fellows of the American Bar Foundation, held in Chicago during the Midyear Meeting of the House of Delegates, was Henry R. Luce, editor of *Time*, *Life* and *Fortune*. Mr Luce's address was a brilliant presentation of the case for peaceable settlement under law of international disputes.**

Last year at Atlanta it was your good pleasure to have as your speaker Lord Hailsham. I think he won't mind if I call him the managing director of the Conservative Party of Great Britain. In words of authentic eloquence, he addressed himself to the question of the future organization of the world. To this question, he said, the East, the Communist East, has an answer "but that answer is a conspiracy against human freedom". Has the West got an answer? In Lord Hailsham's words: "Can the West produce a political idea less offensive than imperialism, less anarchic than the petty nationalism which has brought war and ruin wherever it has been tried—an idea not negative, but positive, an idea dynamic for peace which neither sacrifices justice nor provokes aggression."

Then, turning to the mountains of vision, Lord Hailsham prophesied:

"I see a world where freedom under law is the rule and not the exception for mankind. In that world the sums now spent on arms are devoted to education and research, to the elimination of disease, to the rescue of deserts from the sand . . . and to the enjoyment of the good things of life by the suffering millions of mankind."

Thus prophesied our brilliant friend from Westminster. And I am sure you were impressed by the ardent faith of this practical politician. Would that we had more such politicians here—and everywhere!

Lord Hailsham's eloquence was devoted, in the main, to putting the signature of his conviction to his vision. He did not have much to say about how it is to be achieved. That is the task to which I set myself tonight. If my task is pedestrian, I enter into it nevertheless with enthusiasm. For this reason: the project of bringing about the rule of law on earth, this tremendous project is on the road. Men are at work. Step by step we approach the foothills of those mountains of vision.

## *The West's Idea . . . Liberty Under Law*

"Can the West produce a political idea. . .?" That was, and is, the question. Can we answer it by saying "Yes . . . our idea is liberty under law"? That is *the* political idea of the West. In fact, there is no other. And we need no other. We need only to enter fully into the idea and, with reverent attention, let the idea enter fully into us. "Liberty under law" is the idea which for two thousand years has been elaborated in theory. In a few times and places, notably in America, liberty under law has been significantly realized in practice, thanks to the deeds of Founding Fathers and of other heroes and to the devotion of honest men in all walks of life. Why is it, then, that we have heard so little of it in these past thirty years?

Our unanimous purpose has been to establish a just and durable peace. To that end, we have fought wars. We have spent hundreds of billions of dollars on horrifying weapons. We have given away billions of dollars. We have contracted innumerable military alliances. We have agitated ourselves with debate and doubt. We have propagandized and we have even prayed—but in all this massive material and moral effort we have hardly ever used the word "law"—except in pious parentheses. Why? I ask the question not to answer it for to do so would require a monumental review of modern history. I raise the question just to remind you of the conspicuous absence of the word "law" in all our busy-ness. Somewhere in the answer would be the moral breakdown of the West, the descent of the West into philosophical confusion. On the one hand, spectacular achievement in science and economics; on the other hand more and more intellectual confusion leading to political impotence—there is the good and the bad of a brilliant era.

Can we say that now at last we of the West have begun to work our passage back out of tragic confusion to

reasonable and reasoned hope? I think we can. Can we say that the West is producing an idea? I think we can.

And I should like to sketch—in a few simple human terms as I see it—the story of how it happens that in 1959 the advancement of the rule of law is becoming once again the sign under which the West survives and conquers. The story, as I see it, began in the summer of 1957 at the meeting of the American Bar Association—in London, largely planned by your President, David Maxwell. London! What more symbolic and providential place for the story to begin! There, a few miles from the Runnymede of Magna Charta, there in Westminster, hometown of the Mother of Parliaments, there where all about you have grown the oaks from the acorns of the common law—where else could the idea of liberty under law more fittingly have rebirth? There was the place. And the activating force had to be the power of the United States of America. But this time, in the summer of 1957, that power was represented not by atomic warheads, not by dollars—this time the power of America was represented by American lawyers and by American judges who in turn represent and are the technicians and the trustees of America's ultimate dedication to liberty under law.

It happened that at that time a man, then little known, became the President of the American Bar Association. Taking up the spirit of your London meeting, Mr. Charles Rhyne returned to this country to make the advancement of the rule of law the chief business of his term. In a year and a half the consequences have been—let us not exaggerate—they have been considerable. President Eisenhower, in his State of the Union message this year, made the advancement of the rule of law the significant new emphasis of his world policy. Secretary Dulles devoted himself exclusively to this subject in the last speech he made before going to the hospital. We pray for his return to full activity and to this decisive theme. Under his guidance, proposals for making more sense out of the U.N. Court will presently go to Congress. Such are the results on the visible stage of high policy. But behind these results one sees the gathering of the clan of the warriors for the law. Volunteers and recruits are to be found at every level, among the best legal thinkers and in the smallest bar association.

The way for this crusade has been prepared by many dedicated groups, notably for example by the International Commission of Jurists. In 1955 their Act of Athens gave perfect utterance to our immortal theme. And only last month their conference of lawyers of fifty-three nations in New Delhi, India, testified to what may be the most hopeful single fact of our time—namely that leaders in fifty Asian and African countries realize no less than we do—or more—that whereas the peace of the world depends upon the establishment of law between nations, *that* in turn depends upon the deepening and strengthening of the sense of law *within* nations. Everywhere in the welter of world politics, there grows the belief that civilization depends on the strength and the power of the law.

To enumerate all that is going on concurrently in this country would take me far into the night. May I just stress the importance of the intellectual leadership which is being displayed by various types of law institutes recently established at Cornell, at Harvard, at Duke, at Stanford and at other centers of light and leading. At Cornell, Professor Schlesinger heads up a ten-year project in comparative law. Seeing him the other day, I was immensely encouraged by his assurance that there are basic principles of law which can command assent in all the countries of the free world—and even beyond.

All this is what I mean by saying that once again the West is getting hold of its one great idea.

We are on the march, but we must keep up the momentum. We need more volunteers, stronger leaders—in public life, in intellectual labors, throughout the nation generally and especially in the legal profession itself. If we lose momentum now, we may never regain it until the world entire is engulfed in such a moral catastrophe that those who survive physically may scarcely deem themselves fortunate.

Our purpose is nothing less than at last to make the world the lawful habitation of mankind. Tonight, let me speak of this formidable task under three heads. First, there is the philosophical. Second, there is the political—the development of political leadership in this country together with the winning of public consent through understanding. Third, there is the technical or operational—the immense amount of highly expert work that has to be done—mainly of course by lawyers. Under each of these heads I shall attempt to make only one or two points.

First, then, as to philosophy. The question to be answered by philosophy is whether, on the one hand, law is only what anybody wants to make it, only an accidental product of irrational forces. Or whether, on the other hand, law reflects and must seek to reflect a structure of justice established by the Creator of all things for the right relation of man to man and nation to nation. Only if the second answer is correct, only then does it make any sense to speak of general principles, and only if there are some general principles to which all men everywhere may give their consent, only then is there any hope of Peace through Law.

For many decades, American law schools, American legal thinking and American lawyers have refused to be interested in this basic question. Thus when a few years ago I began to study the possibilities of peace through law, I came across an article in the *Columbia Law Review* by Professor Thomas A. Cowan. Its opening sentence read as follows:

> The most striking observation which occurs to one reporting on the philosophy of Law in the United States is that the subject matter of the report seems not to exist.

Surely a sorrowful indictment! Was this the final and most ugly American know-nothingism? America at the height of her military and economic power—and intellectually aimless, having neither chart nor compass nor rudder nor star to steer by.

Professor Cowan's report continued:

> To the foreigner, American philosophers, apparently spurning all philosophical traditions, seem to be characterizable under only one all-inclusive

"ism", namely anarchism.

Obviously this country cannot contribute to the peaceful ordering of the world if its own mind—and soul— is in a state of anarchy.

There was much to support this darkly pessimistic view—both what is called American anti-intellectualism and the fashion of American intellectuals themselves to distrust or disavow all or any general principles whatsoever.

Fortunately for us the tide has turned. It was predictable that we would come out of the hog-wallow of know-nothingism or positivism. In the field of law or jurisprudence, the reason for faith was stated by Professor Harold Berman some years ago. From him I learned that in times of crisis, Anglo-American law can be expected to rise to the challenge of ultimate greatness. He said:

> In times of relative stability it is customary to forget that the attempt to grasp and comprehend the totality, and to see particulars in relation to that totality, is in fact part of the Anglo-American legal tradition. It is that part which is reserved for crisis.

Well, thought I, we sure are in a crisis. So, if Berman is right, we can expect Anglo-American law to rise to the challenge.

And sure enough it has—or is beginning to. In my recent consultation of the authorities, I came across, for example, Professor Jerome Hall in the *Virginia Law Review*. He is saying:

> The most striking fact about current developments is the rise of natural law philosophies almost everywhere.

Almost everywhere! There is the shining sun of hope upon our future. Almost everywhere! In America, throughout the West including Latin America and notably also in Japan.

Now I would like to say just a word—a very amateurish word—about "natural law". The classic phrase "natural law" is a stumbling block for many thoughtful people. For others it has most satisfying meanings, reflecting that structure of justice of which I have spoken.

### *Natural Law . . . Order and Freedom*

But note that Professor Hall speaks of natural law philosophies—plural. I suggest that there *is*, indeed, one universal natural law to which human beings are and ought to be conformable. But I further suggest that the one and the same natural law is made equally evident by starting from two different emphases. The one emphasis is justice or order. That was the emphasis of classical Rome and of the Middle Ages. The other emphasis is freedom. That has been the American emphasis. Starting with order, you arrive, under Christian inspiration, at the human necessity of freedom. Starting with freedom, you arrive at the social need for order—or in our tradition what we call liberty under law.

I would hope that in the next few years our thinkers would achieve a powerful synthesis of these two approaches to a knowledge of the natural law.

The object, for ourselves and for the world, is to achieve "that liberty which without order is a delusion and that order which without liberty is a snare".

The American word is liberty. In American thought and feeling the rights of man are not derivable from physical nature nor from any absurd Rouseau-ian theory of noble savage or social compact. The rights of man are derived from his Creator.

> Our fathers' God, to Thee,
> Author of liberty,
> To Thee, we sing.
> Long may our land be bright
> With freedom's *holy* light . . .

But the American word is also liberty under law. In American tradition, we have more naturally spoken of the "moral law" than of the "natural law" —not the same things, but closely related. It is typical Emerson to say: "The moral law is at the center of the universe and radiates to its circumference." And so also our greatest men from George Washington and Chief Justice Marshall to President Eisenhower have spoken of the "moral law" or the "higher law" by the light of which the Constitution is to be interpreted.

Finally, there is one more thing to say about the man-made law that serves the moral or natural law. The law is not to be conceived of as something static. The law is to provide for change —change in the direction of greater justice as the vision of justice is continually being revealed to men in ever larger terms. As Matthew Arnold defined God as "a power, not ourselves, which makes for righteousness", so we ought to conceive of justice not as something which we have invented. We must conceive of justice as something established prior to us, "in the beginning", and also as something which stands out beyond us, in whose work we are privileged to participate.

With this kind of concept of justice and of law, we can find confidence in our own minds. We will overcome the intellectual anarchy which has weakened us. And we can go forth, both humbly and confidently, to speak to other men everywhere, inviting them, praying them to reason together, to discern the general principles which all men may hold in common and thus to proceed to make the world the lawful habitation of mankind.

I have been speaking of "we". But who do we mean by "we"? It is my thesis that the advancement of the rule of law should be the major objective of the American nation. This leads me, then, from the philosophical to the political. How shall the resources of this nation be centered on the advancement of the rule of law? Obviously that requires political leadership, which is to say actual politicians, flesh-and-blood politicians, who will make this cause their own.

Ideas have consequences. The role of the politician is to be the executor of an idea. But he cannot execute an idea until the idea has been born, or in this case, reborn and made clear. That is why I have spoken first of the intellectual task. Ideas have consequences—and we also say: Nothing is so powerful as an idea whose time has come. Can we say that the time has indeed come to make the rule of law the dominant force in the world? I think we can for two reasons: first, because the philosophy of law is gaining in health

and strength, and second, because it finds acceptance among leaders of many nations. Thus serious thought has prepared the way for the politician. But the politician has a right to ask something else—he has the right to ask that there be a degree of readiness in the voting public to follow his leadership. Here is our difficulty now: how to get any great part of the public to get interested in, to get urgent about the rule of law. This is a tough one.

I speak now not only as a concerned citizen but as a practicing editor. The doubts that rush to one's mind are sharp—striking deep to the roots of our life as a people. Is it idle fantasy to imagine summoning serious popular interest in so seemingly abstract an ideal as the rule of law? Is it just too much, and too naïve, in a democracy—with all its intellectually leveling processes—to expect a stirring of concern (let alone a surge of zeal) for such an ideal by the hypothetical Mr. Average Citizen?

Well, perhaps brashly, I say "No" and "False" to these pessimistic propositions. And I say in retort: it is not "the law" or "rule of law" that is the abstract concept. It is the concept of the "average citizen" that is the deceptive abstraction.

Let me explain—first about this "citizen", then about the "law".

It is widely asserted that this American citizen lives in a society that lacks high purpose and spiritual vigor. We all have been hearing—a lot of late—the adjectives of lament or scorn applied to our society. Our society is vacuous. It is anti-intellectual. It is mediocre. It is indulgent and egocentric. It is, in short, a society fat with affluence—but pitifully thin in spirit and will and wisdom. And so—what could one expect of the "average citizen"—its typical human product?

I concede some fragments of truth in this grim picture. In many areas of our national life—from the school room to the TV screen—we have a surfeit of the shallow and the banal. But these, in my reckoning, are the frivolities of a characteristically serious and reflective people—serious in purpose, reflective upon their responsibilities to themselves, to other nations, and even to future generations. We love our country. We know as well as love the ideals of liberty that stirred at our birth as a nation, that have strived ever after through our life as a united people. We know that only sustained struggle can carry its ideals into the future—investing that future with promise and meaning. And this is crucial; for the American wants, indeed longs for, nothing so much as to know that his life *as an American* has meaning and purpose.

### *An American Need . . . A Vision of a Just Cause*

If this be true, as I believe, then we can believe one thing more: the American people need the vision of a just cause to summon them to action. Not just any cause, not even just any just cause, but a cause that is right and proper and true for America.

What is the name of this cause—and what is its substance? Peace? Maybe; but peace on what terms, based on what principles, sustained by what purposes? Freedom? Sure—but freedom fortified by what strength, guarded by what rule and authority?

The answer—I submit—is not obscure. The answer is: Peace through *law*—and freedom under law. For surely without law, there can be neither peace nor freedom. And what is a more meaningful, a more authentic, definition of a just cause than—law?

This, then, is no mere academic abstraction. It can be the heart and nerve of our national purpose. It is practical. And it is pertinent.

Let me suggest some proof of these assertions. I submit a piece or two of evidence—what properly can be called highly material testimony—drawn from the plainest facts of mid-twentieth century life.

*First.* As a nation, we confront no more crucial task than that of relating our spiritual and our material values. Put it differently: our task is to translate our highest values into the "lower" language of action and policy. This act of translation is performed by law. For law functions on that middle ground between "the spiritual" and "the material". For law is principle applied to fact. And thus it can be the true catalyst of our national purpose throughout the world as well as at home.

*Second.* The people of the world feel—and feel deeply—that today's sinister balance of power, this peace-by-mutual-terror in which we live, is a dead end. Literally, a *dead* end. And what question is more urgently asked—from New York to New Delhi, from Akron to Accra—than: Is there no way out?

The rudely realistic answer, of course, is: No, there is no way out. The invention of the most horrible weapons of destruction is that fateful aspect of human ingenuity which is irreversible. The secrets unlocked can never be sealed again.

But if there is no way out, there must be something else: a way *forward*. This must be a way that leads toward mastery and control, in the name of justice and liberty, over the new forces unleashed by science.

This is the way of the law.

And therefore I believe that political leaders—of all ranks, of perhaps all nations—have a rare opportunity. To these leaders, we can rightly and reasonably say: Study our proposition. Scan the promise that lies in these simple words: the rule of law. Place this promise on your political banners. Let the people see that you believe. And they will believe—in it, and in you. They will follow. For you will have given them hope—and reason to hope.

Mr. Arthur Larson, who has recently left the White House to set up the World Rule of Law Center, with President Eisenhower's blessing, at Duke University, says that people come to him saying, "I think what you are going to do is one of the most exciting things I ever heard of—but exactly what is it?"

People seem to understand an atomic warhead better than they do the rule of law. But they would like to understand the rule of law because there, they intuit, they may find some "tidings of comfort and joy", which they certainly do not find in atomic warheads.

What then is it, this rule of law? It is, as we have noted, a fundamental concept of political philosophy. It is also a multitude of concrete acts and instances—concrete laws and legal ar-

*(Continued on page 524)*

# American Bar Association

# Eighty-second Annual Meeting

**First Announcement of Program, Bal Harbour—Miami Beach, Florida, August 24-28, 1959**

**The Assembly** The Assembly sessions and the Annual Dinner will be held in the International Room of the Americana Hotel. The opening session is scheduled for Monday, August 24, at 10:00 A.M.; the second session for Wednesday, August 26, at 10:00 A.M. and the third session on Thursday, August 27, at 2:00 P.M. The Annual Dinner (fourth Assembly session) is scheduled to be held Thursday evening, August 27, at 7:30 P.M. The fifth session will be held immediately following the adjournment of the final session of the House of Delegates Friday morning, August 28, in the Medallion Room of the Americana Hotel.

**House of Delegates** The House of Delegates will meet in the Medallion Room of the Americana Hotel at 2:00 P.M. Monday, August 24; 9:30 A.M. and 2:00 P.M. Tuesday, August 25; 9:30 A.M. Thursday, August 27, and 9:30 A.M. Friday, August 28.

## Section Meetings

**Administrative Law** (The Balmoral)

There will be a luncheon for the Council and Committee Chairmen on Saturday, August 22, at 12:30 P.M. followed by a meeting at 2:00 P.M. They will meet again on Sunday, August 23, at 10:00 A.M. and 2:00 P.M. General sessions of the Section will be held Monday, August 24, at 2:00 P.M., and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. A reception is being tentatively planned for Tuesday evening.

**Antitrust Law** (The Carillon)

The Council will meet with Committee Chairmen for breakfast on Monday, August 24, at 8:00 A.M. Three half-day sessions of the Section are scheduled for Monday afternoon, August 24, and Tuesday, August 25. The annual luncheon will be held Tuesday at 12:30 P.M.

The Annual Review of Developments in Antitrust will be presented by Professor S. Chesterfield Oppenheim of the University of Michigan at one of the sessions.

**Bar Activities** (Americana Hotel)

The Committee on Award of Merit will meet on Saturday and Sunday, August 22 and 23, at 10:00 A.M. each day. A Council breakfast has been scheduled for Sunday, August 23, at 8:00 A.M. There will be a regular session of the Section on Monday, August 24, at 2:00 P.M

The general session on Monday afternoon will be devoted to a discussion on Adequate Fees; Co-ordination of Activities Between American Bar Association and State and Local Bar Associations; Law Office Partnership Problems and Procedure; and How To Win an Award of Merit.

**Corporation, Banking and Business Law** (The Balmoral)

The Committee on Savings and Loan Law will start its meeting on Friday, August 21, with a breakfast at 8:30 A.M. followed by a meeting from 10:00 A.M. to 4:30 P.M. with an intervening luncheon at 12:30 P.M. A dinner meeting of the Committee has been scheduled for 6:30 P.M. that evening. A meeting of the Committee on Small Business on Saturday, August 22, at 10:00 A.M. will be followed by a luncheon and meeting at 12:30 P.M. of the Council and Committee Chairmen. There will be a meeting and luncheon of the Section Council on Sunday, August 23, beginning at 10:30 A.M. At 2:30 P.M. that afternoon, the Section will conduct a panel discussion on federal liens jointly with the Sections of Real Property, Probate and Trust Law; Taxation; and Insurance, Negligence and Compensation Law. A meeting of the Food, Drug and Cosmetic Law Division has been scheduled for Monday, August 24, at 2:00 P.M. to be followed by a dinner meeting beginning at 5:30 P.M. There will be a general session of the Section that afternoon at 2:30 P.M. arranged by the Committee on Federal Regulation of Securities. The Committee on Corporate Law Departments has scheduled a meeting for Tuesday, August 25, at 10:00

A.M. The Section luncheon will be held on Tuesday, August 25, at 12:30 P.M. followed by a general session and business meeting at 2:30 P.M. The new officers and Council members will meet that afternoon at 4:45 P.M. *All Council meetings will be held in the Chairman's suite at the Americana Hotel.*

**Criminal Law** (Bal Harbour Hotel)

The general sessions of the Section will be held Monday, August 24, at 2:00 P.M.; Tuesday, August 25, at 10:00 A.M. and 2:00 P.M.; and Wednesday, August 26, at 2:00 P.M.

"Pros and Cons of Capital Punishment" will be the subject presented at the general session on Monday, August 24. Two panel discussions have been scheduled for Tuesday, August 25. The morning session will be devoted to "Labor Racketeers: Diagnosis and Treatment". The four aspects of the subject will be considered —"Law Enforcement Problems", "Union Problems", "The Business Man's Problems", "The Legislator's Problems". In the afternoon the subject will be "Modern Attitudes Toward Crime—An Appraisal of Present Trends". This will be a discussion dealing with trends in crime and criminal law enforcement and the administration of justice. At the opening of the business session of the Section which is scheduled for Wednesday, at 2:00 P.M., August 26, there will be a premiere showing of a film on forensic medicine dealing with the question of the coroner versus the medical examiner. There will also be a discussion of a study of traffic homicides, a study of indeterminate sentencing, a report on the survey of narcotics, a report on the defense of the indigent, and a report on the criminal justice survey.

**Family Law** (Ivanhoe Hotel)

The Council will meet on Sunday, August 23, at 10:00 A.M., and a Council breakfast meeting has been scheduled for Monday, August 24, at 8:00 A.M. General sessions will be held on Sunday, August 23, at 2:00 P.M.; Monday, August 24, at 2:00 P.M.; and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. A Section luncheon has been tentatively scheduled for Tuesday, at 12:30 P.M.

**Insurance, Negligence and Compensation Law** (The Deauville)

The officers and members of the Council and Committee Chairmen will meet on Sunday, August 23, from 9:00 A.M. to 5:00 P.M. with an intervening luncheon at 12:30 P.M. The Section will join with the Sections of Corporation, Banking and Business Law; Real Property, Probate and Trust Law; and Taxation for the panel discussion on federal liens on Sunday at 2:30 P.M. at the *Balmoral Hotel*. A luncheon has been scheduled for Monday, August 24, at 12:00 M. followed by a general session at 2:00 P.M. Other general sessions will be held on Tuesday, August 25, at 9:30 A.M. and 2:00 P.M.; Wednesday, August 26, at 2:00 P.M.; and Thursday, August 27, at 9:30 A.M. A reception at 6:00 P.M. and a dinner dance at 7:00 P.M. have been planned for Tuesday evening. Various Committees of the Section have scheduled breakfast meetings for Monday and Tuesday at 8:00 A.M. each day. There will be a general Section breakfast on Wednesday at 8:00 A.M.

The principal speaker at the Section luncheon, Monday noon, will be Admiral Felix B. Stump, U.S.N. (Retired), Commander in Chief, Pacific and U. S. Pacific Fleet 1953-1958; at present Vice Chairman and Chief Executive Officer of the Freedoms Foundation. United States' relations with the East-Southeast Asian countries will probably be the subject of his address.

**International and Comparative Law** (The Deauville)

The Council will meet on Sunday, August 23, at 9:30 A.M. with a luncheon scheduled for 12:30 P.M. General sessions have been scheduled for Sunday, August 23, at 2:00 P.M. and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. A joint breakfast with the American Foreign Law Association will be held on Tuesday, August 25, at 8:00 A.M. A meeting of the new officers and Council members will be held Tuesday at 4:30 P.M.

**Judicial Administration** (Americana Hotel)

The Executive Committee and the Council will meet on Saturday, August 22, and Sunday, August 23, respectively. The Annual Luncheon for Judges is scheduled for Monday, August 24, at 12:00 M. followed by the Law and The Layman Conference at 2:00 P.M. The Annual Dinner in honor of the Judiciary of the United States will be held Monday evening at 7:00 P.M. General sessions are scheduled for Tuesday, August 25, at 10:00 A.M. and 2:00 P.M.; Wednesday, August 26, at 2:00 P.M.; and Thursday, August 27, at 10:00 A.M. There will be a joint luncheon with the American Bar Association Standing Committee on Legal Aid Work and the National Legal Aid and Defender Association, Tuesday at 12:30 P.M. Also, the Section's Committee on Traffic Courts will join with the Traffic Court Program in an all-day schedule of events on that subject, Tuesday, August 25. A luncheon meeting is being planned for the new officers and Council members, Thursday, August 27, at 12:00 M.

Guests of honor at the Annual Luncheon for Judges, Monday noon, will be members of a team of English jurists who will participate in the Section meetings. Sir Seymour E. Karminski, Judge of the High Court of Justice, and leader of the team, will be the speaker at the luncheon. Tom C. Clark, Justice of the United States Supreme Court, will preside at the Law and The Layman Conference dedicated to its originator, the late Bolitha J. Laws, Monday afternoon. Potter Stewart, Justice of the United States Supreme Court, will be the principal speaker at the Annual Dinner in honor of the Judiciary of the United States, Monday evening.

**Junior Bar Conference** (Fontainebleau)

The Committee on Award of Achievement Judges will meet on Thursday, Friday and Saturday, August 20, 21 and 22, at 9:00 A.M. each day. There will be a meeting of the Board of Directors on Friday, August 21, at 9:00 A.M. The Executive Council is scheduled to meet at 1:30 P.M. that afternoon. A reception will be held at 6:00 P.M.

Friday evening. A breakfast is being planned for Saturday, August 22, at 8:30 A.M. The first general session is scheduled for 9:00 A.M. on Saturday followed by a Conference Assembly at 9:30 A.M. The annual luncheon of the Section is being planned for Saturday at 12:00 M. The Conference Assembly will meet again at 1:30 P.M. and the Award of Achievements will be presented to State and Local Junior Bar organizations at 4:30 P.M. on Saturday. Circuit caucuses will be held at 5:00 P.M. that day. A reception and annual dinner dance will be held Saturday evening at 7:00 P.M. There will be a reception and luncheon for State and Local Junior Bar Presidents on Sunday, August 23, at 12:00 M. followed by an Award of Achievement Workshop at 2:30 P.M. The Nominating and Resolutions Committees are scheduled to meet at 1:30 P.M., that afternoon. The second general session is scheduled to be held Monday, August 24, at 2:00 P.M. The annual debate and reception sponsored by the Conference on Personal Finance Law will be held at 4:00 P.M. on Monday. The newly elected officers and Council members will meet on Tuesday, August 25, at 9:00 A.M. There will be a joint luncheon with the Florida Junior Bar and the Dade County Junior Bar members on Tuesday at 12:30 P.M.

**Labor Relations Law** (The Kenilworth)

Council meetings are scheduled for Saturday and Sunday, August 22 and 23, at 10:00 A.M. each day and a Council luncheon will be held on Monday, August 24, at 12:00 M. General sessions will be held Monday, August 24, at 2:00 P.M. and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. There will be a Section luncheon Tuesday at 12:30 P.M. A reception, through the courtesy of The Bureau of National Affairs, Inc., is being scheduled for Tuesday evening at 5:00 P.M.

The Section is making arrangements for the appearance of a prominent figure in the field of labor management relations. In addition, the Section will hear an analysis of a recent United States Supreme Court decision affecting labor relations law, by Archibald Cox, Royall Professor of Law, Harvard Law School.

**Legal Education and Admissions to the Bar**
joint sessions with
**National Conference of Bar Examiners**
(The Balmoral)

The Council will meet on Saturday, August 22, at 2:00 P.M. and again on Sunday, August 23, at 10:00 A.M. and 2:00 P.M. The Board of Managers of the National Conference of Bar Examiners will hold a breakfast meeting Monday, August 24, at 8:00 A.M. The Section has scheduled joint sessions with the National Conference of Bar Examiners on Monday, August 24, at 2:00 P.M. and Tuesday, August 25, at 10:00 A.M. A joint luncheon will be held on Tuesday at 12:15 P.M. The annual meeting of the Section is scheduled for Tuesday at 2:00 P.M.

**Mineral and Natural Resources Law** (Singapore Hotel)

There will be a Council and Committee Chairmen meeting on Sunday, August 23, at 2:00 P.M. The general sessions will be held Monday, August 24, at 2:00 P.M. and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. The new officers and Council members will meet Wednesday, August 26, at 2:00 P.M.

**Municipal Law** (Beau Rivage)

General sessions are scheduled for Sunday, August 23, at 2:00 P.M.; Monday, August 24, at 2:00 P.M.; and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. There will be a Council breakfast meeting on Monday at 8:00 A.M. and a meeting of the new Council on Tuesday at 4:30 P.M. A Section luncheon is being planned for Tuesday at 12:30 P.M.

**Patent, Trademark and Copyright Law** (The Carillon)

A meeting of the Council and Committee Chairmen has been scheduled for Saturday, August 22, at 10:00 A.M. A Copyright Symposium is being planned for Saturday at 2:00 P.M., and a Trademark Symposium for Sunday, August 23, at 2:00 P.M. A Western Style Dinner and Water Show, to be sponsored by United States Trademark Association, will be held Sunday at 6:30 P.M. The National Council of Patent Law Associations' breakfast is scheduled for Monday, August 24, at 8:00 A.M. General sessions of the Section will be held on Monday at 2:00 P.M.; Tuesday, August 25, at 9:30 A.M. and 2:00 P.M.; Wednesday, August 26, at 2:00 P.M.; and Thursday, August 27, at 10:00 A.M. The International Patent and Trademark Association (A.I.P.P.I.) will hold a luncheon on Tuesday at 12:30 P.M., and the Section is planning a luncheon for Wednesday at 12:30 P.M. The annual dinner of the Section is scheduled for Tuesday at 8:00 P.M. to be preceded by a reception and cocktail party at 7:00 P.M. There will be a luncheon meeting of the new Council and Committee Chairmen on Friday, August 28, at 12:30 P.M.

Symposium and luncheon speakers will cover such subjects as the new proposed industrial design copyright law, the licensing of trademarks, the impact of recent antitrust consent decrees upon the patent system, and the patent provisions of the National Aeronautics and Space Law. Speakers will include Robert A. Bicks of the Justice Department; Robert C. Watson, Commissioner of Patents; Arthur Fisher, Register of Copyrights; and Jerrold G. Van Cise, Vice Chairman of the Section of Antitrust Law.

**Public Utility Law** (Shamrock Isle, formerly the Colonnade Hotel)

A Council meeting has been scheduled for Sunday, August 23, at 2:00 P.M. General sessions will be held on Monday, August 24, at 2:00 P.M.; and Tuesday, August 25, at 10:00 A.M. and 2:00 P.M. with an intervening luncheon meeting for Council members and guest speakers at 12:30 P.M. A reception at 7:00 P.M. and a dinner dance at 8:00 P.M. have been planned for Tuesday at the *Americana Hotel*. There will be a breakfast meeting for the new Officers and Council members Wednesday, August 26, at 8:00 A.M.

Oren Harris, Congressman from the Fourth District of

Arkansas, will address the Section on Tuesday morning, August 25. The title of his address will be "Independent Regulatory Agencies and Legislative Oversight".

**Real Property, Probate and Trust Law** (Americana Hotel)

A meeting of the Council and Committee Chairmen has been scheduled for Saturday, August 22, at 10:00 A.M., and the Council will meet again on Sunday, August 23, at 10:00 A.M. The Section will join with the Sections of Corporation, Banking and Business Law; Insurance, Negligence and Compensation Law; and Taxation for the panel discussion on federal liens on Sunday at 2:30 P.M. at the ***Balmoral Hotel.*** A breakfast meeting of the Council has been scheduled for Monday, August 24, at 8:00 A.M. A business session is scheduled for Monday at 1:45 P.M. to be followed by a general session (Probate Law Division) at 2:00 P.M. The officers, members of the Council and Chairmen and members of Committees will hold a breakfast meeting on Tuesday, August 25, at 8:00 A.M. followed by a general session (Real Property Law Division) at 9:30 A.M. The annual meeting of the Section is scheduled for Tuesday at 1:45 P.M. and another general session (Trust Law Division) will be held at 2:00 P.M. A reception at 6:45 P.M. and annual dinner at 8:00 P.M. are scheduled for Tuesday evening at the ***Eden Roc Hotel.*** There will be a breakfast meeting for the new Council on Wednesday, August 26, at 8:00 A.M.

**Taxation** (Americana Hotel)

The officers and Council will meet in executive session on Thursday, August 20, at 9:00 A.M. and 2:00 P.M. There will be meetings of the Council and Committee Chairmen Friday, August 21, at 9:00 A.M. and 2:00 P.M. Business sessions will be held Saturday and Sunday, August 22 and 23, at 9:00 A.M. and 2:00 P.M. each day. Section luncheons are scheduled for Saturday and Sunday at 1:00 P.M. each day. There will be a reception at 7:30 P.M. and a dinner dance at 9:00 P.M. on Saturday evening. The Section will join with the Sections of Corporation, Banking and Business Law; Insurance, Negligence and Compensation Law; and Real Property, Probate and Trust Law for the panel discussion on federal liens on Sunday at 2:30 P.M. at the ***Balmoral Hotel.*** A business session will be held Monday, August 24, at 2:00 P.M. A technical session is scheduled Tuesday, August 25, at 10:00 A.M. A special session on state and local taxes will be held at 2:00 P.M. that day at the ***Singapore Hotel.***

The foregoing programs are not in final form and are subject to change. The completed programs will appear in a later issue of the AMERICAN BAR ASSOCIATION JOURNAL and the program of the Bal Harbour—Miami Beach meeting. The program for the meeting will be sent to all members of the Association approximately thirty days prior to the meeting.

# *Make Your Hotel Reservations Now!*

The Eighty-Second Annual Meeting of the American Bar Association will be held in Bal Harbour—Miami Beach, Florida, August 24-28, 1959.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 23, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 24.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the *$15.00* registration fee for *each lawyer* for whom a reservation is requested. This fee is *NOT* a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired, and by whom you will be accompanied. We must also have a definite date of arrival, as well as probable departure.

Sleeping accommodations (all air-conditioned) are still available as follows: Allison, Aztec Motel, Bal Harbour, Beau Rivage, Bel Aire, Biltmore Terrace, Blue Horizon, Carillon, Casablanca, Chateau Motel, Deauville, Delmonico, Dunes Motel, Eden Roc, Florida Shores, Golden Gate Hotel & Motel, Ivanhoe, Kenilworth, Last Frontier Motel, Lombardy, Malaluka, Martinique, Monte Carlo, Safari Motel, Shamrock Isle (formerly Colonnade), and Thunderbird Motel. Location and rates (European Plan) appeared at page 50 of the January JOURNAL. Reservations will be confirmed as promptly as possible.

Since the hotels in the greater Miami Beach area have reserved a definite number of rooms for the accommodation of American Bar Association members, all members who expect to attend the Annual Meeting are urged to make their reservations through the Association's Headquarters Office. These hotels have assured the Association of their intention to adhere to the commitments they have made to it, and the Association, in turn, desires to adhere to the commitment it has made. All reservations made through the Association office will be on the European Plan. American Plan rates offered by some of the hotels in the area may involve a substantial amount of duplicate expense for those who desire to attend the many luncheon and dinner functions included in the Association's program.

In any event, payment of the registration fee for the meeting is required in order to participate in the various activities and functions of the meeting.

# Florida Hosts Promise

# "Grandest Entertainment at Annual Meeting"

Get set for "the time of your life", for loads of "fun in the sun", when you go to the Annual Meeting of the American Bar Association next August.

That's the word from the lawyers of Florida, 6,500 strong, who are determined that a true-Florida-style entertainment program will provide American Bar Association delegates, their wives and families an always to be remembered ultra-delightful visit.

Spearheading the plans, of course, is the Dade County Bar Association, which means Miami, Miami Beach, Coral Gables, Hialeah and other famous names along that ocean-breeze-swept, sun-bathed wonderland hailed the world over as Florida's celebrated "Gold Coast".

It's going to be a setting the like of which the Association has never known before. The most glamorous hotels and motels ever built by man will serve members as the base of their operations. All are on the ocean front, with surf bathing convenient and with glamorous swimming pools for those who prefer calm, fresh water. The entire family will enjoy these hotels; those with children may prefer to stay at one of the beautiful ocean-front motels which are a short distance north of the hotels. When members are not occupied with the official business of the meeting, there will be an unending program of entertainment.

One interesting thing, which the committees down Florida way are proudly pointing to, is that "no fixed schedules" will be the rule.

The spectacular water shows presented by Pete DesJardins and Bob Maxwell are the most amazing offerings of their kind and will be presented several times so that if you can't attend the first or second show, you'll surely be able to get to the third.

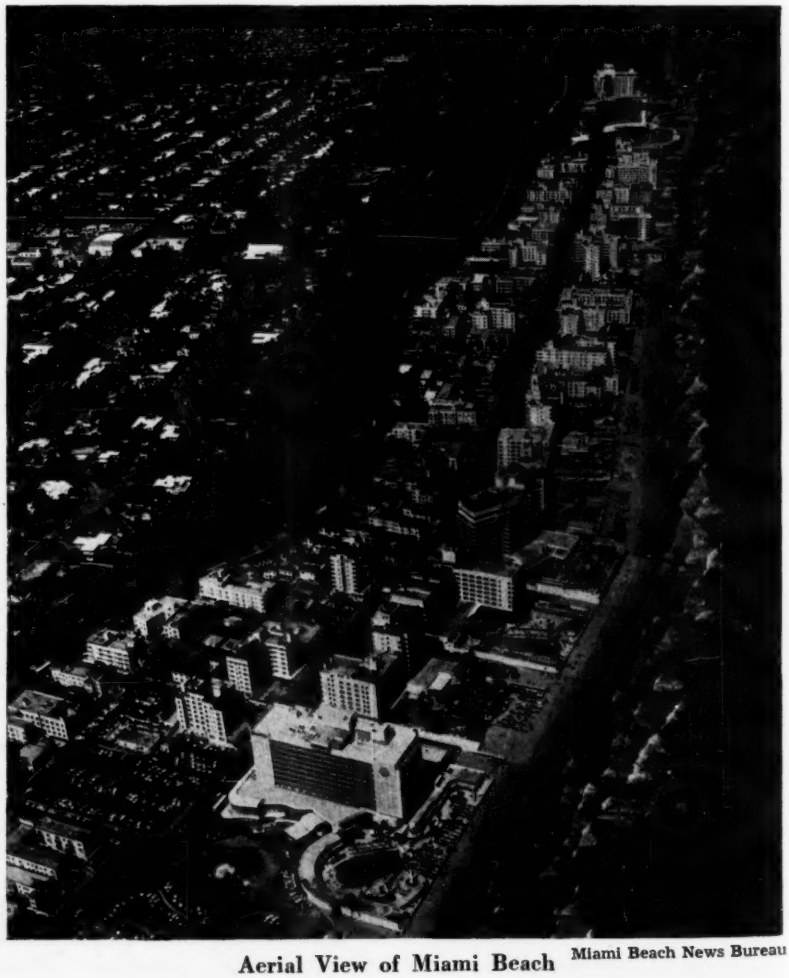
Beautiful boat trips on Biscayne Bay and through the famous canals of Miami Beach will be available many times, so the visitor may select one or more trips to suit his convenience.

Sightseeing tours will be organized in the same way, so you can visit "as it best fits the schedule" the numerous attractions of the Greater Miami area.

And there is no place where "the night club circuit" seems to offer so much; for those who will attend on a reasonably fixed budget, special tours will be arranged.

One of the nicest things about this 1959 Annual Meeting is that it is going to be held in sub-tropical Florida, which, according to the United States Weather Bureau, has the most days of comfort for year-round, out-door living.

August is pleasant in South Florida, contrary to some opinion. The summer



Aerial View of Miami Beach Miami Beach News Bureau

bugaboo of "real hot days" affects sub-tropical Florida less than it does such places as Los Angeles, New Orleans, New York, Houston, St. Louis, Atlanta, Cleveland or Denver. Official studies by the U. S. Weather Bureau over the past thirteen years disclose that Florida has fewer days with temperatures of 90 or higher than any of these cities.

And they would like to point out that it's the time of year for you to bring along, and thoroughly enjoy, your sports wardrobe. Except for the formal occasions, or sessions where business attire is in order, one can dress informally and be sure of not feeling out of place.

There's nothing you will want to do, say the folks down Miami way, except to climb a mountain or go in quest of desert fauna, that you won't find "at your finger tips".

You will be able, for example, to leave your hotel and in a mere matter of minutes be on your way to a deep-sea fishing expedition The Atlantic Ocean off southeast Florida offers prize fishing, and for the disciple of Izaac Walton, such an expedition will be a must.

And what of that ardent golfing lawyer? The committee has made arrangements for ample golfing facilities to be at the disposal of that man who marks down as the No. 1 item his set of golf clubs when he starts to pack.

And, ladies, your attention, please! Special features for your enjoyment are being planned by a committee of Florida lawyers' wives. Southern hospitality will be the keynote. Sightseeing, such as a stroll down world-famous Lincoln Road on Miami Beach will, no doubt, be on every lady's schedule.

Yes, for you ladies attending the meeting, there's going to be so much that will appeal to you.

Everyone will be specially interested in the transportation plans. Shuttle buses are going to operate for the free transportation of American Bar Association folks to all major events. You have to know the "lay-out" to appreciate what is meant by the saying "up and down Collins Avenue".

And how will you be arriving in Miami? If by air, your plane will put down on the runways of the world's newest and most modern international airport, which truly is the busiest international airport today.

If your Florida Annual Meeting trip is to be made by automobile, you, no doubt, have already looked at the maps. By whatever route you take, coming down from the East or Midwest, when you cross the Florida line, you will begin to note Florida attractions almost at once. Some of these are famous the world-over, and we urge you to allow sufficient time, going or coming, to visit these major attractions—indeed they are "a once in a life-time" experience.

Many have inquired concerning post-meeting trips to the nearby enchanting Caribbean islands. Cuba, the Bahamas, Haiti, Jamaica, Puerto Rico, to name a few, may be visited by comfortable ships or planes that "island-hop" to major points of interest. A Caribbean cruise is recommended for those who want to vacation for a few days or for a week or two among these sub-tropical islands. No passport or other "red tape" is required.

Did you say that maybe they have forgotten tennis? Oh, no, you will be advised of plans for this sport and recreation too, in the pre-meeting entertainment booklet which the committees are issuing as an information guide to all who register in advance for the meeting.

Yes, the details will shortly be available to you. This is merely to say to you in May, members of the Association, that you are going to have the grandest entertainment, on the most flexible basis you've ever experienced, when you're in Florida in August. That's the promise of those 6,500 Florida lawyers, and we know they are going to do everything they're telling us about so fascinatingly at this time.

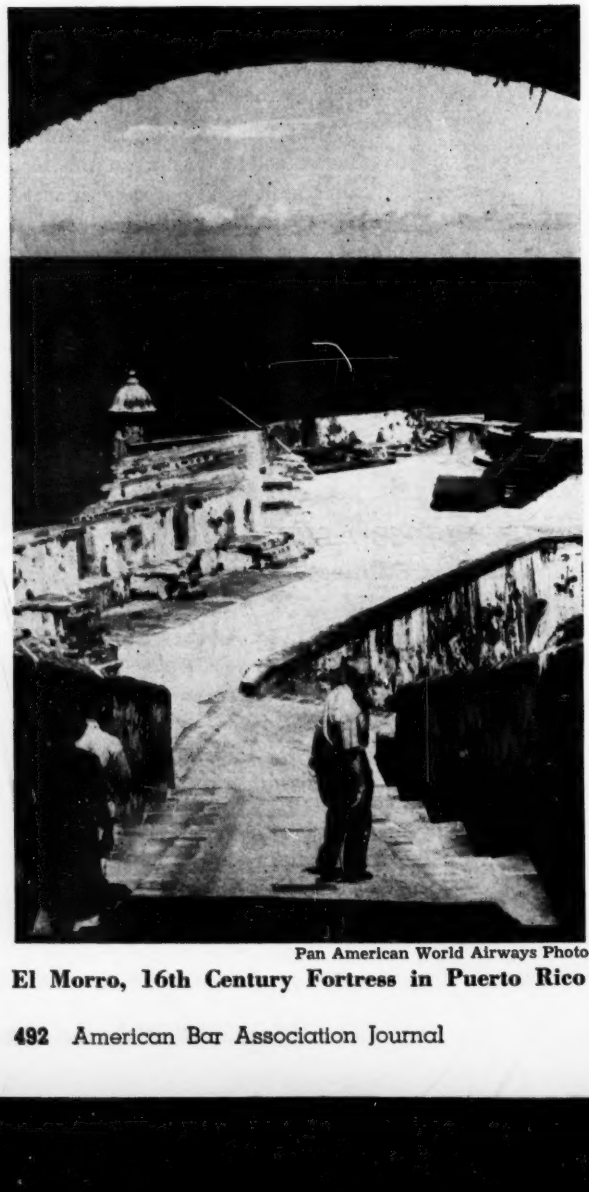
# After Miami Beach—

# South America or the Caribbean

### *The Caribbean Island Hopping Trip*

***Jamaica—August 28 to September 3***

Fly from Miami to Montego Bay—your introduction to the tropical islands of the blue Caribbean. Three delightful days at the Montego Beach Hotel, then on to Ocho Rios and the famous Arawak Hotel for another two days. Our last visit in Jamaica is at Kingston where accommodations are at the well-known Myrtle Bank.



Pan American World Airways Photo

**El Morro, 16th Century Fortress in Puerto Rico**

***Haiti—September 3 to September 6***

We fly to Port au Prince and the excellent Riviera Hotel . . . an idyllic setting of sea and mountains. Interesting motor trips here to Kenscoff and La Decouverte and the Old City with its high walled gardens and narrow streets.

***Puerto Rico—September 6 and 7***

Your next hop brings you to another luxury hotel—the San Juan Intercontinental. Sparkling pools, golden beaches, dancing, floor shows and motor trips all add to your enjoyment.

***Virgin Islands—September 8 and 9***

A short flight brings you to St. Thomas and again the many and excellent facilities of a renowned hotel—the Virgin Isle—are at your disposal. The sightseeing program here differs from the others—just as do the Islands themselves, the natives, customs and nationalistic backgrounds of each.

***Miami—September 10***

A morning flight returns the party to Miami, bringing to a close a colorful gay vacation filled with pleasant memories of the islands visited—all different—all enjoyable.

**The Cost**

The cost is $494.00 per person plus $2.60 for tourist permits and includes round trip first-class air transportation, superior hotel accommodations, two to a room, with bath—American plan (except San Juan, where no meals are included). Also included are the motor sightseeing trips, transfers of passengers and baggage and most gratuities for porters, maids and waiters. A tour escort will accompany you for the complete tour.

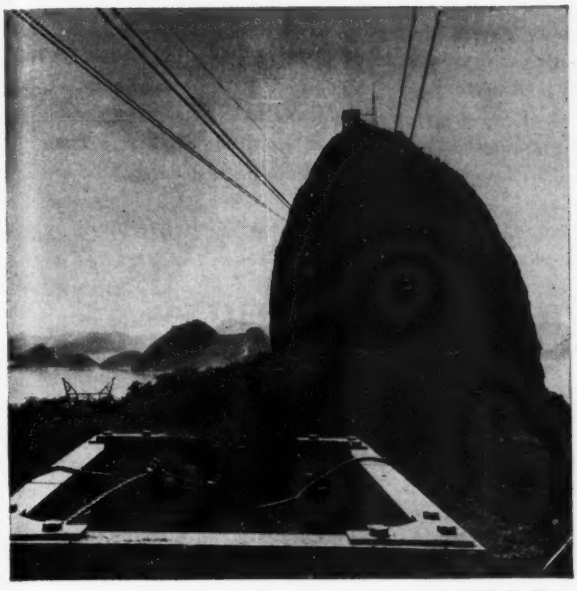
### *The "Around South America" Tour*

***Panama—August 28 and 29***

An evening flight from Miami brings you to Panama and the El Panama Hotel. Here we enjoy a fine motor tour embracing among other places of interest, the great Panama Canal, of course, and the Pedro Miguel Jungle Preserve.

***Lima and Cuzco—August 30 to September 2***

A most complete visit to this beautiful capital city of Peru with its modern developments and the contrasting imposing ruins of Cajamarquillo. An optional trip to Cuzco, ancient



W. W. Yates

Sugar Loaf Mountain, Rio de Janeiro

W. W. Yates

Palace of Justice, Lima

capital of the Incas and to Machu Pichu with its magnificent and awe-inspiring ruins.

### *Santiago—September 3 and 4*

A brief but rewarding stop-over is enjoyed at Santiago, capital of Chile and fourth largest city of South America. Fine accommodations and interesting sightseeing complete the program.

### *Buenos Aires—September 5 to September 8*

Three full days to experience the many attractions of this largest city of Latin America. There is a nice balance of planned activity and leisure time for you in this modern city, as cosmopolitan and sophisticated as any in the world.

### *Montevideo—September 9 and 10*

A pleasant sojourn at this charming and gracious capital of Uruguay. This Riviera of South America, with its miles of sandy cabana-dotted beaches, is a highlight on any South American journey.

### *Sao Paulo—September 11 and 12*

This completely modern, great industrial city of Brazil is a splendid example of the growth and progress of the country. You will have an enjoyable motor program with ample time for personal meandering.

### *Rio de Janeiro—September 13 to 15*

The colorful capital of Brazil is a city of beauty with its white buildings, mosaic walks and world-famous Copacabana Beach. Your planned program will include the outstanding attractions of this great city—but allows enough free time for personal pursuits.

### *Caracas—September 16 and 17*

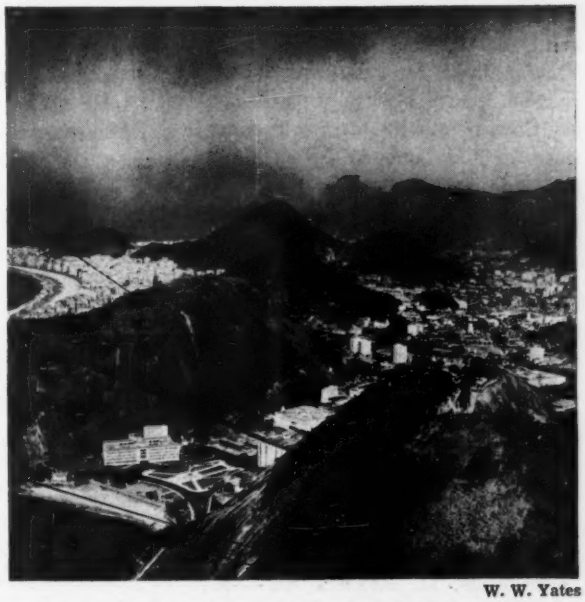
Caracas, the growing capital of Venezuela and one of the wealthiest cities of the world, is our last port of call. Here we have a chance to rest up in the spring-like, invigorating climate.

### *Miami—September 18*

Today the home-bound flight from Caracas returning to Miami will bring to a close our South American adventure.

## The Cost

The cost per person is $1,215.00 plus $140.00 for the optional Cuzco side trip. The amount is based on special round-trip first-class air fare (less than thirty days) . . . first-class hotels (two to room) *table d'hôte* breakfast, lunch and dinner at Panama and Cuzco only; breakfast only at other stops. Motor sightseeing by private car or motor-coach—English-speaking guides; transfers to and from air-



W. W. Yates

Rio de Janeiro from Cable Car, looking toward Sugar Loaf Mountain

ports; entrance fees to museums, etc. Also included are taxes in conjunction with tour features and gratuities to waiters where meals are included in the tour. A tour escort will accompany the party for the complete tour Miami to Miami.

An attractive brochure has been printed giving full particulars on both trips including the cost and information on passports and other travel credential requirements—and telling how reservations may be made. This itinerary brochure and complimentary colorful literature may be had by writing to

W. M. MOLONEY, Vice President
Harvey R. Mason Travel Co. Inc.
64 Old Orchard, Skokie, Illinois

# Upper Ohio Valley Regional Meeting—Pittsburgh, Pennsylvania, March 10-13

The twenty-first regional meeting of the American Bar Association since the commencement of the present program in 1951 was held in Pittsburgh, March 10-13. Designated as the Upper Ohio Valley Regional Meeting, the States of Pennsylvania, Ohio, West Virginia and portions of western New York and western Maryland were included.

Total registered attendance was 954, including wives and other guests. With excellent speakers and an unusually wide variety of workshop programs, those who were present felt fully rewarded despite the snow and frigid temperatures which no doubt curtailed attendance.

The Pittsburgh meeting was planned and conducted by Co-Chairmen J. Vincent Burke, Jr., and Dr. Charles B. Nutting. John G. Buchanan was Honorary Chairman of the meeting and presided at the banquet. Splendid cooperation was received from the Allegheny County Bar Association, under the presidency of Thomas W. Pomeroy, Jr., and a substantial number of Pittsburgh firms and corporations contributed generously to the hospitality extended the visiting lawyers.

The first Assembly on March 11 was opened by President Malone. After greetings were received from the President of the Pittsburgh Bicentennial Association, from the Pennsylvania and Allegheny County Bar Associations, and from the city and county governments, D. Malcolm Anderson, Assistant Attorney General in Charge of the Criminal Division, United States Department of Justice, spoke briefly on policies of the Department of Justice in the enforcement of criminal law. He described some of the difficulties encountered by the Department in meeting the problem of organized crime and indicated that the anti-trust laws might prove to be the most effective weapon in dealing with criminal syndicates.

### *President Malone's Address*

President Ross Malone then delivered the principal address of the morning. His topic was "The House of Delegates and Its Recommendations for Internal Security Legislation". He described in considerable detail the way in which the House of Delegates is selected, pointing out that it is truly representative of all segments of the American Bar. He then explained the action taken by that body at the 1959 midwinter meeting, emphasizing that the House did not in any sense attack the Supreme Court of the United States, but rather had opposed measures which would limit the jurisdiction of the Court. The recommendations for legislative action made by the House, he stated, were designed to cure defects in legislation pointed out by the Court. He concluded with the assertion that "... only through the existence of an independent judiciary can individual freedom in this country be preserved and liberty under law be a reality. I have no hesitation in predicting that whenever that issue is presented the Bar will be found, as it is found today, in the foremost ranks of the supporters of the Supreme Court of the United States as a vital instrument of our government."

### *Other Principal Addresses*

The Assembly was followed by a luncheon at which the principal speaker was Clinton P. Anderson, United States Senator from New Mexico. Senator Anderson, who is chairman of the Joint Committee on Atomic Energy, chose as his topic "Lawyers, Legislators and the Atom". (See page 509) Although disclaiming any legal knowledge, he dealt in an extremely lawyer-like way with the various problems involved in the use of atomic energy for peaceful purposes. Among these were the authority of the state and local governments to control health hazards resulting from fall outs, employee radiation safety, and workmen's compensation, liability and tort problems, including the question of indemnity and insurance. He urged lawyers to study these problems and to offer advice regarding them at all governmental levels.

On Thursday, March 12, a banquet was held at which the principal speaker was Arthur H. Dean, former U. S. Ambassador to Korea. Mr. Dean's topic was "Negotiating with the Communists—the Nature of the Problem". He pointed out the essentially different premises on which Communism and Democracy are based. He stated that the fundamental element of good faith is never present with Communist nego-

tiators. After reviewing the history of the Berlin situation, he described various courses of action which might be followed by the West. He concluded with the statement, "... we must also continually and constantly study with a fresh mind and approach those means and methods which will help us to learn to live in peace, as we must, in this hard and realistic world with our adversaries as well as our allies."

The final assembly luncheon on Friday, March 13, was addressed by J. Lee Rankin, Solicitor General of the United States, who, after offering a tribute to the Bicentennial, spoke on the topic, "An Independent Supreme Court".

He referred to the fact that throughout the history of the United States, the Court has been a center of controversy. Today, he said, the Court is the "target of a rare combination of dissident groups who have found common ground in their displeasure with decisions in their fields of special interest." He urged the Bar to defend the Court against attacks which might undermine its independence.

### *Workshops and Other Meetings*

The Pittsburgh meeting was distinguished by the number and variety of programs offered, chiefly by the Sections and Committees of the American Bar Association. Some eighteen meetings involving over eighty speakers and panelists were held. A complete description of these events is impractical in view of space limitations. Among the more significant discussions were the following:

A program on impartial medical testimony was presented by the Section of Judicial Administration. The need for such testimony was emphasized and means of securing it were pointed out. A program on "How To Be a Lawyer Without Being Broke," presented by the Special Committee on the Economics of Law Practice, was, needless to say, received with skepticism as well as appreciation. The Section of Corporation, Banking and Business Law organized an outstanding program which ran through two days. An unusual feature was a discussion of the subject "Corporate Counsel and the Bar", which was especially appropriate in view of the fact that Pittsburgh is the headquarters of a number of important national corporations.

Perhaps because of the city's industrial prominence, the programs presented by the Antitrust and Patent Law, Trademark and Copyright Sections were particularly well-received. Representatives of the government agencies and lawyers in private practice united for the discussion of significant current problems in these areas. The Section of Administrative Law offered the same combination of government and private counsel in explaining "How To Obtain Information from Agencies Before Advising Clients".

A discussion of "International Disputes and International Tribunals" was presented by the Section of International and Comparative Law. This included consideration of the nature of disputes arising from America's international business and attracted considerable interest.

A program of unusual significance, offered by the Municipal Law Section, concerned "Federal and Municipal Relationship in Urban Redevelopment". The topic was considered from the standpoint of present-day concepts of urban renewal, legal implications involved in federal-state relationships, and of the positions of public and private counsel in urban renewal programs.

In spite of the emphasis on public law and governmental relations, a number of discussions of private law topics were presented. Among these, one of the most enthusiastically received, was a program offered by the Real Property, Probate and Trust Section on "Pitfalls for the Draftsman of Wills and Trusts." Professorial expositions of the problem were supplemented by a discussion by practitioners.

The formal program was supplemented by other events among which were breakfasts of the American Judicature Society and the Section of Insurance, Negligence and Compensation Law. Nine alumni law school luncheons were held on Thursday, March 12. In addition to collaborating with the Insurance, Negligence and Compensation Law Section in the presentation of its formal program, the Junior Bar Conference conducted a workshop and maintained a hospitality room throughout the meeting.

### *Social Events*

In addition to the luncheons and the banquet, a number of attractive social events were provided by the committee in charge. Two receptions were held, and on the evening of Wednesday, March 11, a program was presented by the Tamburitzans. This is an organization of entertainers sponsored by Duquesne University. They presented a stimulating program of folk dancing and music in a highly professional manner. Their performance was followed by dancing.

The ladies arranged a special program of entertainment which included organized tours to various points of interest in the city and a luncheon and style show presented by Jonasson's of Pittsburgh at the Edgeworth Club of Sewickley. The ladies maintained a hospitality room throughout the meeting.

### *Participants*

In addition to the persons who participated in the actual program, the meeting was attended by Sylvester C. Smith, Jr., Chairman of the House of Delegates; Joseph D. Calhoun, Secretary of the American Bar Association; Robert K. Bell, member of the Board of Governors for the Third Circuit; John D. Randall, President-Nominee; Whitney North Seymour, President-Elect nominee; former President David F. Maxwell; and Lewis F. Powell, Jr., Chairman of the Regional Meetings Committee. Also present were F. Brewster Wickersham, William R. Van Aken, Harry Scherr, Jr., and William M. Woodroe, Presidents of the Pennsylvania, Ohio, and West Virginia Bar Associations, respectively. They, together with the State Delegates, lent their support and advice to the planning of the meeting.

# Books for Lawyers

VOICES IN COURT: A TREASURY OF THE LAW. *Edited by William H. Davenport. New York: The Macmillan Company. 1958. $6.95. Pages x, 588.*

Here is treasure-trove indeed. In fact, there are so many gems that it is virtually impossible to choose from among them. And there isn't a zircon among them; all are of the first water. Even the list of contributors (there are thirty-nine of them, ranging from Montaigne to Alexander Woollcott) makes exciting reading, for it represents the who's who of literate lawyers and legal literature. It may be that you won't like everything in this volume, although it is likely that you will; but if you don't find something to your taste, then you must be indeed inordinately hard to please.

Take, for example, Charles Curtis's essay on advocacy with which the book opens. You don't have to agree with his thesis that a lawyer must sometimes lie on behalf of his client; but I defy you to read it without at least being stimulated to think about the problem which he poses. Then, to leap almost to the end, there is the "Case of the Speluncian Explorers", in which Lon L. Fuller raises questions just as perplexing and equally provocative. And both share that lightness of touch and mastery of style which makes reading a pleasure as well as a stimulus.

The great men of the law move through these pages as well. There is Lincoln, as Carl Sandburg pictures him in his early years at the Bar; Holmes and Lord Coke, portrayed by Catherine Drinker Bowen; and Lloyd Paul Stryker, as his friend and college mate, Alexander Woollcott, saw him. Among the judges are Marshall as revealed in his autobiographical letter to Joseph Story, and also in an excerpt from Beveridge's monumental *Life;* Taney, Brandeis and Fuller from the pens of Carl Swisher, Alpheus Thomas Mason and Willard L. King, respectively; and, from an earlier day, Macaulay's bitter sketch of Jeffries, the hanging judge, and those of W. Forbes Gray of two old Scots judges, Lord Monboddo and Lord Braxfield, the latter reputed to be the original of Stevenson's *Weir of Henniston.*

Speaking of fiction, that phase of the literature of the law is by no means neglected. *Bardell* v. *Pickwick* is reported in full (Charles Dickens, reporter) and the great Chaffenbrass defends Phineas Finn against a charge of murder with the help of his creator, Anthony Trollope. Stephen Vincent Benet's *The Devil and Daniel Webster* could not have been omitted, and it is not; but Guy de Maupassant's *Madame Luneau's Case* is perhaps less well known, although equally fascinating. And, in a more modern vein, old Judge Coates has some wise things to say about the law in the passage from James Gould Cozzen's *The Just and the Unjust* which has been included.

There are many wise things said about the law in this book. Henry David Thoreau says some of them in writing of *Civil Disobedience;* Michel de Montaigne others in his essay *Of Experience;* but neither need yield to Arthur Vanderbilt, Learned Hand or Oliver Wendell Holmes when writing of their chosen profession. That inimitable gadfly H. L. Mencken vents his spleen upon the criminal law with his usual effectiveness; and William S. Holdsworth, using *Bleak House* as a starting point, dissects the chancery procedure of Dickens' day to the point of anatomization.

Among the dramatic courtroom scenes presented, perhaps the trial of Oscar Wilde is the headliner; but the *Baccarat* case and the *Seddon* case deserve at least supporting billing. Frances L. Wellman writes of the art of cross-examination and illustrates with an example from the suit of Mrs. Reginald Vanderbilt for the custody of her child; and Joseph Dean treats of the problem of libel of the dead with the late Lord Gladstone as his subject.

"Law and literature" is the thesis of this book; and it is appropriate that it should contain the famous essay of that name by Benjamin Nathan Cardozo. But in addition there are two essays by Lord Macmillan on similar subjects, and the address delivered by John Mason Brown before the American Law Institute on "Language, Legal and Literary", which gives a layman's view of our linguistic foibles. These however are but explicit statements of what is implicit throughout the volume: that a lawyer without literature is but a mere mechanic and not the architect of language which he might, with some knowledge of it, become.

I have by no means exhausted the contents of this volume; but this should be sufficient to titillate your taste and send you hurrying to procure a copy by whatever means may be available to you. Don't, however, attempt to borrow mine. I expect to keep it by me and dip into it again and again, for gems never lose their lustre, and only become clearer and more lucid with constant use. And in this case treasure-trove belongs to him who finds it.

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee

THE IDEA OF FREEDOM. *By Mortimer J. Adler. New York: Doubleday & Company. 1958. $7.50. Pages 689.*

The plan or objective of this work is to present a comprehensive analytical survey of the different theories of the philosophers of the Western World during the last 2,500 years on the nature or definition of "individual freedom".

A further volume is to be published in order to complete this survey. The project contemplates that this will be followed by a similar survey of the philosophers' theories on other "basic ideas", such as law, knowledge and justice, manifestly an exceedingly ambitious research program.

The method of making the survey is described at great length, at times, it seems, with unnecessary minuteness of detail. A few of the salient features must suffice. First, the author expressly refrains from indicating any views as to the relative merits of the conflicting

theories of these philosophers and in order to avoid, as far as possible, any unintentional indication of bias it was decided to have a number of associates, to the end that by examining each other's results any unintentional deviation from a strict neutrality might be detected and eliminated. Second, the method is not "historical" in any sense, nor does it attempt any historical development of the theories of freedom. On the contrary, the views of these philosophers are treated as if they had all been contemporaries or, as the author also puts it, as if all of these philosophers had been attending a single general meeting at which the author and his associates were present merely as observers or reporters, taking notes of the statements made by this hypothetical assemblage.

This disregard of difference between past and present was facilitated by the discovery that there was a large degree of agreement between the conflicting views of the ancient philosophers and the conflicting views of today, but a large degree of disagreement among the philosophers of any one particular time. In the field of science the reverse is true. Contemporary scientists are found to be largely in agreement with each other, but in disagreement with scientists of the past. This is ascribed to the fact that in science man ascertains the truth, if at all, by the objective methods of observation and experiment, whereas, in the field of philosophy the method is necessarily subjective, namely, a matter of thought processes. Here a question arises in the mind of this reviewer as to whether in the field of philosophy man had already attained his maximum of intellectual powers some 2,500 years ago.

Another feature is that it has nothing whatever to do with "freedom" in a legal or political sense except to describe the effect that "law" in general has had upon the differing concepts of freedom which philosophers have held. Consequently, it is not particularly directed to the legal profession.

Speaking generally, the author states that there have been and still are two outstanding concepts of freedom. One, that it consists in each individual doing exactly as he wishes, regardless of whether his wishes be good or bad; the other, that freedom consists in the individual having so disciplined himself that he will have but *one* wish, namely, to do what to him seems right. This latter was the theory of the Stoic philosopher, Epictetus, who, although a slave, maintained that he alone was free and that the real slave was his tyrant master because he was constantly the slave of a multitude of wishes or impulses which he could never hope to gratify.

The methods by which man acquires or possesses freedom are said to be three, namely: Freedom may depend upon the circumstances surrounding the individual. This is designated as "circumstantial" freedom. Second, it may be acquired by the individual by self-discipline or, according to another subdivision of this group, acquired by religious influence, this being known as "acquired" freedom. The third method of possession called "natural" freedom is possessed naturally by virtue of man's inherent nature.

The book furnishes a stimulating exercise in following the close distinctions and refinements of definitions which are to be found in writings in the field of abstract philosophy. It seems doubtful, however, that the book would be of general interest to the public.

WILLIAM G. MCLAREN

Seattle, Washington

THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS. *By John R. Schmidhauser. Chapel Hill, North Carolina: The University of North Carolina Press. 1958. $5.00. Pages 241.*

The author states that any federal system requires an institution to determine conflicts of authority between the nation and the states comprising it. He undertakes, apparently successfully, to establish this statement by a discussion of the origins of this need in the colonial and federation periods and in the Philadelphia Convention in which the Constitution was drafted.

The above covers only seventeen pages. The rest of the book is a skillful and scholarly analysis, for the most part, of the manner in which the Supreme Court exercised that power. Much interesting and informative material may be found in his chapters on the formative decade, the Marshall Court, the Taney Court, the Chase Court, the Waite Court, the Fuller Court, the White-Taft Court, the Hughes Court and the Court under Stone and Vinson and Warren.

As the author points out, there are serious problems in this unique roll as supervisor—via judicial review—of both the state and Federal Governments. One of them is the continuing controversy as to whether the Court can make law through changing and perhaps enlarging the early views as to the meaning of the Constitution or whether this should be left to the amendatory process as provided in the Constitution itself. This debate is still unresolved although it would seem that at least the present Court has taken an affirmative stand in favor of its power both to change and enlarge.

Perhaps a more serious branch of this problem, the author points out, is the propensity of some of the Justices to substitute their own views concerning the wisdom of legislation for those of the legislators. In doing so the author infers that some of the Justices even attempt to enforce their own special social or economic philosophies. We might add that there are occasions when it would appear that the Justices have read an intent into legislation which has surprised the legislators themselves and in a few instances has even been contrary to their expressed intent.

Another difficulty, as stated by the author, seems to be that times and conditions change faster than the Justices themselves. We assume this is on the theory that the Supreme Court should instantaneously modify its rulings to keep in step with changing conditions. This is reminiscent of Mr. Dooley's statement concerning the Supreme Court following the election returns.

The author seems to infer that the recent change in the Supreme Court in which emphasis is placed upon civil rights may even be in advance of the national and state executive and legislative branches.

We hesitate to disagree with this statement since we are so thoroughly

in favor of protection of civil rights. However, we suggest that, while the Court is making law to meet changing conditions, perhaps the Court has been too preoccupied with civil rights to observe the most important changed condition, namely, the threat to our national security from the Communist conspiracy. In this respect we suggest the Court may have retrogressed and that the Congress and legislatures are well ahead of it in adopting legislation in trying to protect the national security. Consideration might be given to the civil rights of thousands of patriotic men who are being drafted into the Armed Services because of the "cold war" waged by this international Communist conspiracy. Little regard seems to be given to the tremendous imposition on the lives of these blameless draftees or to our necessary maintenance of men and materiel in all parts of the world ever on the alert, even to having loaded bombers continually in air ready on signal to fly to predetermined objectives, and our gigantic, soaring national debt, all in defense of our way of life. On the other hand it would seem that every artifice of constitutional construction is exercised in the defense of the civil rights of those accused of treason in carrying out the orders of the Soviet high command in this world conspiracy.

If changing conditions justify law making by the Court, would it not be reasonable for the Court in the light of this new, imminent and terrible menace, to take this most important changing condition into consideration before striking down legislation which has been labored over mightily by members of Congress and state legislatures in the honest belief that such legislation is necessary to safeguard our national security?

The author generally has been very conservative in expressing his personal opinions. This is a scholarly, readable, informative book which attempts to give the arguments for the position of the Supreme Court as final arbiter and to outline in some detail the manner in which this power has been exercised.

BENJAMIN WHAM

Chicago, Illinois

SALE-LEASEBACKS AND LEASING IN REAL ESTATE AND EQUIPMENT TRANSACTIONS. *By Harvey Greenfield and Frank K. Griesinger. New York: McGraw-Hill Book Company. 1958. $15.00. Pages 107.*

This book involves a technique of business finance which is or should be of considerable interest to lawyers. While the book is not expressly written for lawyers, it presents in practical settings the forms of various leasing transactions which are of growing interest and with respect to which lawyers should have knowledge as to the practical, legal and tax attributes.

One of the authors, Mr. Greenfield, is a lawyer in New York City and the other author, Mr. Griesinger, is an officer of a corporation which includes leasing of equipment in its program. Together they have written a very helpful book which will give the lawyer a view of the occasions for the use of the sale and leaseback and leasing techniques in connection with real estate and equipment and their practical advantages in the operation of a business. The authors have included legal and tax considerations in their discussions of the use of these techniques. While obviously further research would be necessary in any case before drafting instruments or handling leasing transactions, nevertheless the financial and legal considerations generally involved are spelled out in this book.

The sale and leaseback device in real estate is a financing device which has advantages where properly used. The book indicates the opportunities for obtaining a deduction for federal income tax purposes for the cost of land, through payment of rent under lease instead of having outright ownership. Attention is also given to such factors as depreciation, accounting treatment, and options, both from a standpoint of general legal draftsmanship and tax considerations. The role of leasebacks in connection with estate planning (such as in connection with purchase and lease transactions in the Canadian provinces) are also cited.

In the real estate field, an important contribution of the book is in stimulating thinking toward the use of the sale-leaseback technique as an alternative to mortgage financing. As the authors point out, it is possible to obtain lower interest rates and greater availability of cash, as well as the tax advantage of a deduction for the cost (rent) of land, in contrast with a typical mortgage situation. In connection with financing new construction, the authors also point to the use of the sale-leaseback device in having a three party arrangement under which a builder builds to the potential lessee's specifications, under an arrangement whereby an investor will purchase the structure upon completion and lease back to the lessee. A note of caution should be sounded in such cases because the Revenue Service may scrutinize these transactions to determine whether in substance the lessee is the real owner of the property, with a consequent denial of rental deductions to the "lessee" and ordinary income treatment to the builder on his gain.

In the section on leasing of equipment, the authors point to the practical uses of the leasing device from a business and financial viewpoint, particularly including the advantages of equipment leasing (as contrasted with purchase) as a hedge against inflation, as a protection against obsolescence, as a possible saving in servicing and in helping small business meet its financing problems. The authors express their disappointment with the position of the Internal Revenue Service which has put a damper on the use of equipment leasing plans even where there is no purchase option in the lessee. In particular, the Revenue Service seems to treat a leasing arrangement under which the lessee obtains an equity in the property through rental payments as a form of conditional sale. This emphasizes the danger of leasing arrangements where a rental is charged which cannot be substantiated as normal or reasonable. However, the Revenue Service will give advance rulings on whether a leasing arrangement is a lease or a conditional sale. In general, the factors that will be taken into consideration are pointed out by the authors.

A valuable contribution is made by the authors in including in this book many of the new forms and subjects for leasing arrangements, such as in

auto leasing, truck leasing, aircraft leasing, tire leasing, vending machines, etc.

This book may stimulate lawyers to suggest opportunities for their business clients to use leases in fields in which the leasing technique can serve a proper function. At the very least, it will give the lawyer an acquaintanceship with a growing field of business operation in which the old legal device of a lease finds many new and practical uses.

NORMAN A. SUGARMAN

Cleveland, Ohio

BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES (THE INTERNATIONAL JOINT COMMISSION, 1912-1958). *By L. M. Bloomfield and Gerald F. Fitzgerald. Toronto, Canada: The Carswell Company, Ltd. 1958. $6.50. Pages x, 264.*

The subtitle of this little book is more descriptive of its contents than is its principal name. The work focuses on the operations of the International Joint Commission under its organic law, the Boundary Waters Treaty of 1909 between Great Britain and the United States. Of necessity, from the Commission's actions there has evolved a practical interpretation of the treaty's meaning and of the Commission's powers under it. This the book elaborates along the lines of the I.J.C.'s several functions—judicial, investigative, administrative and arbitral—with appropriate citations from the seventy-two dockets the Commission has considered in its forty-six years of work. The practicing lawyer inexperienced in the ways of the Joint Commission is likely to find this a helpful feature. For instance, reading the Boundary Waters Treaty to determine what uses, obstructions or diversions of boundary waters require the approval of the Commission, one finds an explicit requirement only with respect to those that affect the natural level or flow of boundary waters on the other side of the boundary. Yet the Commission has taken jurisdiction of applications to repair and reconstruct old dams although no effect on the level or flow of boundary water was contemplated. No doubt the practitioner familiar with the Commission and its work already knows the attained scope of its judicial jurisdiction, but the novice will not easily find this information without this book, since the proceedings of the Commission are not available in any reporter system. Other features helpful to the attorney with a client to represent, or to counsel, in matters pertaining to the Commission are found in the appendices. Here are set out the Boundary Waters Treaty itself, as well as the related treaties regulating the level of the Lake of the Woods and the diversion of the Niagara River, together with the implementing legislation of both countries. Perhaps of greater importance, Appendix 3 states the rules of procedure of the I.J.C. and Appendix 7 lists the rivers and lakes that are boundary waters as defined by the treaty.

The authors of *Boundary Waters Problems* remark in their foreword that scholars are now trying to formulate general legal principles to govern the uses of waters of international rivers, and suggest that they would profit from pondering the I.J.C.'s experience in dealing with water use problems in such rivers. It would seem the suggestion is a good one, but the present book does not go as far as it might in laying bare this experience to the scholars' view. It is true that the dockets of matters presented to the Commission for judicial, investigative or other action are summarized, and that the summaries comprise the bulk of the book. It is also true that the chapters describing the judicial and investigative work of the Commission sketch the role played by boards of experts (usually engineers) in carrying out these functions, a point of some interest, perhaps, to the political scientist. But the summaries are little more than a tease. Suppose one wants to know the type of evidence the Commission thinks pertinent in an application for approval of a dam in boundary waters. Does it consider the proposed dam's effect on scenic beauty? One can determine from the summaries which dockets deal with applications to build dams, but for the details of the material evidence one must search out the dockets themselves in the Commission's libraries in Washington and Ottawa. However, until the dockets are themselves printed for general distribution the summaries are useful in at least drawing attention to the dockets that may shed light on the researcher's problem.

Practitioner and academic researcher alike may bemoan the general dearth of discussion in the book. The authors usually set out what the Commission did in a given situation, and perhaps will state the opposing argument made. But there is almost never any treatment of the reason for the Commission's action. It is remarked the Commission has behaved pragmatically, but this is of little help in predicting its future actions without detailed knowledge of the interest groups that have attempted to gain recognition in the past, and of the circumstances of the attempts.

In the concluding section of the textual portion of the book the authors repeat the comment of the foreword that the Commission's experience would be helpful to those now wrestling with the problems of use of international waters and remark that "a detailed analysis of the Commission's experience in dealing with regional and local requirements remains to be made". To which the reply occurs, "True. It probably also would help the folks working with interstate water use problems. It is too bad you fellows didn't choose to make that study yourselves."

G. GRAHAM WAITE

The Catholic University of America
Washington, D. C.

FEDERAL TAX FRAUD LAW. *By Ernest R. Mortenson. Indianapolis: The Bobbs-Merrill Company, Inc. 1958. $12.50. Pages 312.*

Tax controversies, particularly fraud cases, are basically "adversary proceedings", Mr. Mortenson emphasizes in the preface and introductory chapter of his volume on *Federal Tax Fraud Law.* Surely, this is a sound observation. Nevertheless, relatively few taxpayers obtain the benefit of representation which gives more than lip-service to the adversary aspects of tax investigations. Almost invariably, the taxpayer's representative hasily complies with

each and every request of the revenue agents, thereby sacrificing the client's statutory and constitutional rights. Such co-operation is generally extended in the *bona fide*, though frequently mistaken, belief that the client will benefit, though many lawyers are frankly concerned about their own "good relations" with the agents. Fortunately, however, there is a growing awareness among the better-informed practitioners that clients involved in tax fraud investigations are generally best served by utilizing the maximum protection afforded by statutory and constitutional safeguards.

In keeping with the author's introductory thesis, the following apt remarks from the text are noteworthy: "no lawyer is expected to lend his active aid to Government agents who are seeking to put his client in jail"; "only in the exceptional case should the taxpayer make available privileged books and records"; "many of the taxpayers' representatives . . . do their clients more harm than good"; "the tax adviser should keep in mind that he is entitled to some more strikes later in the procedural game"; "many of the big battles in tax evasion cases are fought with non-tax ammunition". To each of these comments, this reviewer says "Amen".

From the standpoint of the practitioner's need, it is unfortunate that Mr. Mortenson did not devote more space and effort to the development of suggestions and procedures for effective representation in tax fraud investigations. This does not imply that the author's efforts have little practical value. On the contrary, he has drawn liberally on extensive experience in and out of the Government to present useful material which is not readily found elsewhere. Thus, the chapter on "The Evolution of a Tax Fraud Case" outlines the facts of an hypothetical fraud case, sets forth the report of the special agent, and discusses the manner in which conference opportunities were used to avoid a prosecution recommendation. The chapter on "Trial of a Criminal Tax Case" contains a trial outline which will be of particular interest to those not familiar with criminal tax cases. From the same standpoint, Mr. Mortenson's chapter on "Specific Evidentiary Problems" also merits commendation. Title headings of the remaining chapters are as follows: "Records and Evidence in the Taxpayer's Possession"; "The Criminal Sanctions"; "Use of Indirect Evidence in Tax Fraud Cases"; "The Framework of a Criminal Tax Trial"; "The Civil Penalties"; and "Collection Procedures".

Mr. Mortenson's volume should be well received by lawyers interested in material relating to investigative, pretrial, and trial procedures in tax fraud cases. Substantive matters, and the legal aspects of the procedural phases, are discussed in an adequate manner. Although there is comparatively little footnote documentation, the absence of a table of cases and authorities is regrettable.

PAUL P. LIPTON

Milwaukee, Wisconsin

## New Books for the Practicing Lawyer

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Guaranty Trust Company of New York. SUGGESTIONS FOR THE PREPARATION OF WILLS AND TRUST AGREEMENTS, for members of the Bar exclusively. New York. 1958. Pages 51. Apply.

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Curtis, C.P. THE MODERN PRUDENT INVESTOR; how to invest trust funds. (November, 1952) 2d ed. Philadelphia: Committee on Continuing Legal Education. 1958. Pages 142. $3.00. (paper)

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Federer, J.F. ADVERTISING BUSINESSES. Madison: University of Wisconsin. University Extension Division. 1958. Pages 180. $2.00. (Seminar series for Wisconsin lawyers, 1958)

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# Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

## Admiralty . . . *unseaworthiness*

*Crumady* v. *The Joachim Hendrik Fisser, The Joachim Hendrik Fisser* v. *Nacirema Operating Company*, 358 U. S. 423, 3 L. ed 2d 413, 79 S. Ct. 445, 27 U. S. Law Week 4158. (Nos. 61 and 62, decided February 24, 1959.) *On writs of certiorari to the United States Court of Appeals for the Third Circuit. Judgment of the Court of Appeals reversed and judgment of the District Court reinstated.*

Crumady was a stevedore injured when a boom fell aboard the libelled vessel. He brought this action in admiralty and the vessel impleaded the stevedoring contractor.

The evidence indicated that the winch which operated the boom had a circuit breaker as a safety device which was set to shut off the current on the application of a load of about six tons, twice the rated load of the gear. It also appeared that the working stevedores had moved the boom in order to clear cargo from the sides of a hatch, which created a heavy load on the topping-lift. The District Court held that these conditions made the vessel unseaworthy and therefore liable to the petitioner. It also directed the stevedoring contractor to indemnify the vessel for the petitioner's damages.

The Court of Appeals reversed, holding that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of the stevedores.

Mr. Justice DOUGLAS, speaking for the Supreme Court, reversed and reinstated the District Court's judgment. The Court declared that the evidence was ample "to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch . . . was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand. While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit."

The Court said that the stevedoring company was liable to indemnify the vessel because the negligence of its employees, which made the vessel unseaworthy, amounted to a breach of warranty of workmanlike service on the part of the contractor.

Mr. Justice HARLAN wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER joined. The dissent argued that while the hoisting gear was rated at three tons, such ratings are made in terms of supporting a load of not more than one fifth of the strength of the cable, so that the cable in this case was strong enough to withstand a strain of fifteen tons. A Coast Guard standard for the setting of such a safety control indicated that the setting at six tons was entirely safe and proper, the dissent asserted.

The cases were argued by Abraham E. Freedman for Crumady, Victor S. Cichanowicz for the vessel, and John J. Monigan, Jr., for the Nacirema Company.

## Admiralty . . . *licensees*

*Kermarec* v. *Compagnie Générale Transatlantique*, 358 U. S. 625, 3 L. ed. 2d 550, 79 S. Ct. 406, 27 U. S. Law Week 4106. (No. 22, decided February 24, 1959.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

The ultimate issue here was the duty owed by a shipowner to a visitor aboard one of its ships who would be a "licensee" in a common law action. The Court held that the shipowners owed a duty of reasonable care.

Kermarec boarded the respondent's vessel to visit a member of the crew. While aboard, he fell and was injured, allegedly because of the defective way in which a canvas runner had been tacked to a stairway. He brought this action for personal injuries in the District Court, alleging unseaworthiness of the vessel and negligence on the part of the crew. The District Judge took the view that New York law applied, the vessel having been in port in that state when the accident occurred. The judge therefore eliminated the unseaworthiness claim and instructed the jury that Kermarec was a "gratuitous licensee" who could recover only if the respondent had failed to warn him of a dangerous condition known to it and only if Kermarec himself was entirely free of contributory negligence. The jury found for Kermarec but the trial court set aside the verdict, ruling that there was a failure to prove that the shipowner actually knew that the stairway was dangerous. The Court of Appeals affirmed.

Mr. Justice STEWART delivered the opinion of the Supreme Court reversing. The injury occurred in navigable waters, the Court said, and therefore the District Court was in error in ruling that New York law applied. The standards to be applied, then, were those of admiralty law.

There had been no prejudice to the petitioner's rights, however, the Court found, because New York law placed a heavier burden of proof on him than the applicable admiralty rules. The Court said that the District Court was correct in eliminating the unseaworthiness claim since Kermarec was not a member of the ship's company or a

Reviews in this issue by Rowland Young.

workman on the ship.

This left the nature of the duty of care imposed by admiralty as the only question, and on this issue the Court refused "at this late date" to import into admiralty the conceptual distinctions of the common law between licensee and invitee. "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests, the duty of exercising reasonable care under the circumstances of each case", the Court declared.

The case was argued by Edward J. Malament for petitioner and by George A. Garvey for respondent.

## Admiralty . . . *state law*

*The M/V Tungus* v. *Skovgaard*, 358 U. S. 588, 3 L. ed. 2d 524, 79 S. Ct. 503, 27 U. S. Law Week 4095. (No. 43, decided February 24, 1959.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

The issue here was whether a state statute granting a right of action for wrongful death was broad enough to encompass an action for death caused by the unseaworthiness of a vessel. The Court held that it was.

The decedent was the maintenance foreman of a firm engaged to handle the discharge of a cargo of coconut oil. He was summoned to repair a defective pump, slipped on a patch of oil on the vessel and fell to his death in eight feet of hot coconut oil. His widow brought this suit in admiralty against the ship and its owners to recover damages for the death, alleging unseaworthiness of the vessel and negligent failure to provide the decedent with a safe place to work. The District Court dismissed on the ground that a death action for unseaworthiness would not lie and that the petitioners owed no duty to provide the decedent with a safe place to work. The Court of Appeals reversed.

Speaking for the Supreme Court, Mr. Justice STEWART affirmed the Court of Appeals. The Court began by noting that there is no action for wrongful death in admiralty in the absence of a statute. The question was whether New Jersey's wrongful death statute was broad enough to cover death caused by unseaworthiness, since the death occurred in New Jersey's territorial waters. The Court refused to adopt the extremely broad theory urged by the respondent, which would have allowed the federal court to ignore completely the conditions that the state put upon the right it created. Given a wrongful death statute, the respondent urged, the court may apply the full corpus of the maritime law. Instead of this broad theory, the Court upheld the decision of the Court of Appeals—that the question was one of interpretation of New Jersey law and the New Jersey statute did encompass a claim for unseaworthiness. The difficulty was that the New Jersey courts have announced no rule on questions of the decedent's contributory negligence or assumption of risk. The Court of Appeals left these questions open, to be determined upon retrial, and the Supreme Court was content to let this method of handling the problem stand.

Mr. Justice FRANKFURTER's concurring opinion in the *Halecki* case, *infra*, was also applicable to this decision.

Mr. Justice BRENNAN, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS, wrote an opinion concurring in part and dissenting in part. The Court's solution, the dissent argued, is contrary to the basic principle of uniformity of maritime law, and the result is that the remedy for non-fatal maritime injuries will be determined by the federal maritime principles, while fatal injury cases will be subject to state remedies.

The case was argued by J. Ward O'Neill for petitioners and by Bernard Chazen for respondents.

## Admiralty . . . *unseaworthiness*

*United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U. S. 613, 3 L. ed. 2d 541, 79 S. Ct. 523, 27 U. S. Law Week 4102. (No. 56, decided February 24, 1959.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Judgment vacated and cause remanded.*

In this case, the Court held that the admiralty doctrine of unseaworthiness could not be used as the basis for recovery of damages for the death of a worker engaged in the overhaul of a generator aboard ship.

The pilot boat *New Jersey* was taken to a Jersey City shipyard for its annual overhaul. One of the jobs was the overhaul of the generators which required that they be sprayed with carbon tetrachloride. This was highly specialized work and was subcontracted to Halecki's employer. The work was done on a Saturday, a day chosen because nobody else was aboard the ship. Carbon tetrachloride is toxic when present in concentration in the air, and special precautions had to be taken in spraying the generators. Halecki died from carbon tetrachloride poisoning after working on the job. His widow brought this action under the New Jersey Wrongful Death Act, federal jurisdiction being invoked because of diversity of citizenship. The Court of Appeals held that the New Jersey statute incorporates liability for unseaworthiness as developed by federal law and adopts the admiralty rule of comparative negligence when death occurs as a result of tortious conduct on navigable waters. The jury found for the administratrix, and the Court of Appeals affirmed.

The Supreme Court reversed, again speaking through Mr. Justice STEWART. In refusing to allow application of the doctrine of unseaworthiness, the Court said that this doctrine was intended to protect seamen, while the work done by Halecki was in no way the "type of work" traditionally done by a ship's crew. Not only could the work not be performed at sea, the Court declared, but it could be done only when the ship was "dead" with its generators dismantled. "Indeed," the Court remarked, "the work was so specialized that the repair yard engaged to overhaul the vessel was not itself equipped to perform it, but had to enlist the services of a subcontractor . . . at a time when all the members of the crew were off the ship." A new trial was necessary, the Court explained, because there was no way of determining whether the claim of unseaworthiness was the sole basis for the verdict.

Mr. Justice BRENNAN wrote a dis-

senting opinion in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS joined. The dissent argued that *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, extended the remedy of unseaworthiness to all situations "when a man is performing a function essential to maritime service on board a ship . . ." The fact that the vessel here was modern, had complicated equipment and required specialized treatment should not relieve the owner of his duty of seaworthiness, the dissent declared.

The case was argued by Lawrence J. Mahoney for petitioners and by Nathan Baker for respondent.

### Commerce . . . *state taxation*

*Northwestern States Portland Cement Company* v. *Minnesota, Williams* v. *Stockham Valves and Fittings, Inc.* 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, 27 U. S. Law Week 4141. (Nos. 12 and 33, decided February 24, 1959.) *No. 12 on appeal from the Supreme Court of Minnesota. Affirmed. No. 33 on appeal from the Supreme Court of Georgia. Reversed.*

At issue here was the validity of state income taxes levied on the net incomes of out-of-state corporations. The Court upheld the levies even though they were imposed upon income derived from exclusively interstate commerce "fairly apportioned to business activities within the taxing State".

The Minnesota tax had been upheld by that state's supreme court, but the Georgia court had invalidated that state's tax on the ground that it violated the commerce and due process clauses of the Federal Constitution.

The Court's opinion was delivered by Mr. Justice CLARK. The Court declared that, while the states cannot tax the "privilege" of engaging in interstate commerce nor impose a tax that discriminates against such commerce, the "entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs". "The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State", the Court went on. "These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction'."

Mr. Justice HARLAN wrote a concurring opinion directed specifically at the dissenting opinions of Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER. Justice HARLAN declared that he could not read the pertinent cases as the dissenters did. He viewed the taxes in question as part of general schemes of state income taxation. "The taxing statutes are not sought to be applied to portions of the net income of Northwestern and Stockham *because* of the source of that income—interstate commerce—but rather *despite* that source", he said. "The thrust of these statutes is not hostile discrimination against interstate commerce, but rather a seeking of some compensation for facilities and benefits afforded by the taxing States to income-producing activities therein. . ."

Mr. Justice FRANKFURTER's dissenting opinion held that the Court was "breaking new ground" and that no previous case had upheld the taxing power of a state when applied to corporations engaged in interstate commerce where there was a total absence of activities pursued in the state that could be severed from interstate commerce. The cases raised far-reaching problems of federal-state fiscal policy, the dissent went on, problems that the Court was poorly equipped to handle and that should be left the Congress.

The dissent of Mr. Justice WHITTAKER was joined in by Mr. Justice FRANKFURTER and Mr. Justice STEWART. This dissent argued that the Court in fact appeared to be resting its decision upon a theory that there was intrastate as well as interstate commerce involved, while the courts below had found expressly that the commerce was exclusively interstate. "Direct taxation of 'exclusively interstate commerce' is a substantial regulation of it and, therefore, in the absence of congressional consent, the States may not directly tax it", the opinion argued. "This Court has so held every time the question has been presented here until today."

The cases were argued by Joseph A. Maun for appellant in No. 12, Perry Voldness for appellee in No. 12, Ben F. Johnson for petitioner in No. 33 and John Izard, Jr., for respondent in No. 33.

### Commerce . . . *state taxation*

*Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 3 L. ed. 2d 450, 79 S. Ct. 411, 27 U. S. Law Week 4136. (No. 38, decided February 24, 1959.) *On appeal from the Supreme Court of Appeals of Virginia. Affirmed.*

This case was the second round of Virginia's legal battle to levy a tax against the Railway Express Agency. In 1954, the Supreme Court struck down a state assessment on the appellant's privilege of doing business in Virginia, holding that the statute violated the commerce clause. The state fared better here with a new statute, the Court holding, over the dissent of two Justices and the expressed reservations of two others, that the state's "franchise tax", measured by gross receipts from operations within the state, was constitutional.

The appellant attacked the tax on the ground that it violated the commerce clause, like the former privilege tax, or at any rate that the amount of the tax was calculated in such a way as to deprive it of property without due process of law. The validity of the tax had been upheld by Virginia's highest court.

Mr. Justice CLARK delivered the opinion of the Supreme Court affirming. The tax in question was levied upon appellant's intangible property and "in lieu of taxes upon all of its other intangible property and . . . rolling stock". The tax was measured on appellant's gross receipts, fairly apportioned, and was laid only upon receipts "derived from the transportation within this State of express transported through, into or out of this State". The tax had been construed by the state as one upon the appellant's tangible property and "going concern" value, the Court noted. The Court conceded that a tax measured by gross receipts might not be the best measure of "going concern" value, but said that it was too late to question the constitutionality of such a tax.

The appellant had failed to file information as to its gross receipts, the Court went on, examining the due process argument, and thus the state had an "almost insurmountable" burden in trying to ascertain them. Therefore, the Court declared, "it is necessary that appellant make an affirmative showing that the . . . method used by Virginia is so palpably unreasonable that it violated due process. This it has failed to do." The Court also dismissed the argument that the tax in question, some $139,739.66, was no just equivalent of the taxes "in lieu of which" it was levied and therefore could not be sustained as due process. The state had the power, the Court answered, to tax the "going concern" value of *all* of appellant's property in Virginia.

Mr. Justice FRANKFURTER concurred in the result.

Mr. Justice HARLAN noted that he shared Mr. Justice BRENNAN's reservations as to the propriety of considering the tax as a property tax, but he was unable to distinguish this "in lieu" tax from similar levies that had been upheld in a long line of cases.

Mr. Justice BRENNAN joined in the Court's opinion and judgment, but wrote a concurring opinion questioning whether the tax could be a property tax. The $139,739.66 tax was imposed "in lieu of" other taxes imposed on other kinds of business, he said. But these other taxes aggregated only $7,235.76. Justice BRENNAN said that he would have preferred to view the tax as a levy on gross receipts fairly apportionable to the taxing state.

Mr. Justice WHITTAKER wrote a dissenting opinion in which Mr. Justice STEWART joined. As the dissent saw the case, the issue was Virginia's contention that it could tax the percentage attributable to the Virginia business of the value of Railway Express's national good will and of its exclusive express carriage contract with the railroads. As the dissent saw it, the good will inhered *exclusively* in interstate business, and hence was beyond Virginia's taxing power.

The case was argued by Thomas B. Gay for appellant and by Frederick T. Gray for appellee.

## Constitutional law . . . *equal protection*

*Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 3 L. ed. 2d 480, 79 S. Ct. 437, 27 U. S. Law Week 4110. (No. 10, decided February 24, 1959.) *On appeal from the Supreme Court of Ohio. Affirmed.*

This case presented the novel situation in which a resident of Ohio contended that it was denied equal protection of the laws because it was subject to a state tax while certain classes of non-residents were specifically exempted. The Court held that the tax was valid.

The tax in question was an *ad valorem* tax on personal property, the statute in question containing a "proviso" that "merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for storage only" within the state were exempt from the tax. The appellant, an Ohio corporation, maintained four warehouses where it stored merchandise for sale in its retail stores. When the Tax Commissioner of Ohio sought to assess the *ad valorem* tax on the material in the appellant's warehouses, appellant petitioned the state Board of Tax Appeals for a redetermination, arguing that its property was "merchandise . . . held in a storage warehouse for storage only" and that taxing residents, but exempting non-residents from taxation, on such merchandise was a denial of equal protection. The Board upheld the tax and ultimately the case went to the state supreme court, which held that appellant lacked standing to raise the constitutional question and affirmed a denial of relief.

Mr. Justice WHITTAKER delivered the opinion of the Court. The Ohio court had reasoned that, if the proviso were invalid, the result would be that it should be stricken from the statute. This would leave the appellant still subject to the tax. The Ohio court did not strike the proviso, however, and the Supreme Court held that the appellant had standing to sue, saying that as long as the proviso was part of the statute, it was immaterial that the appellant's claim would necessarily fall if the proviso were stricken.

On the merits, the Court said that the equal protection clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation". The rule was, the Court went on, that "The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary . . . the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' ".

The Court could not find that the Ohio statute in question was "invidious or palpably arbitrary". The state legislature may have wanted to encourage the construction or operation of warehouses by non-residents, the Court reasoned, or it may have intended to stimulate the market for merchandise and agricultural products by enabling non-residents to purchase and hold them in the state for storage only.

Mr. Justice STEWART took no part in the consideration or decision of the case.

Mr. Justice BRENNAN wrote a concurring opinion in which Mr. Justice HARLAN joined. This opinion suggested that the equal protection clause was necessary to protect the federal nature of our government: a state may not discriminate in favor of its own residents against the residents of other states. But in this case, the state was favoring residents of other states, and therefore there was no state action "disruptive of the federal pattern".

The case was argued by Carlton S. Dargusch, Sr., for appellant and by William Saxbe and John M. Tobin for appellee.

# What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

## Federal Courts . . .
### *manufactured jurisdiction*

The Court of Appeals for the Third Circuit has found nothing wrong with the shifting of a Pennsylvania personal representative from resident to non-resident for the sole purpose of creating the necessary diversity of citizenship to file a wrongful-death suit in a federal court.

The first administrator was the decedent's mother, a resident of Pennsylvania. About ten months after her appointment she secured leave from the probate court to resign, as the petition frankly said, "in order that letters of administration may be granted to a non-resident for the purpose" of bringing the death suit in a federal court. When the suit was commenced, the defendant moved to dismiss it under 28 U.S.C.A. §1359, which bars jurisdiction where "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction . . ." of a federal district court.

The Third Circuit felt that it was bound by Supreme Court decisions which it read as approving the administrator shift. It took the statute apart, examined the words "collusion" and "improper" and concluded they imputed more base conduct than present in this case. "Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in a federal court is not collusive within the ordinary meaning of that term", the Court declared. Then, using one of the words itself, the Court concluded: "If what we deem the law is to be changed we think that it would be improper for that change to emanate from this court."

(*Corabi* v. *Auto Racing, Inc.*, United States Court of Appeals, Third Circuit, February 26, 1959, Biggs, J.)

## Federal Taxation . . .
### *jeopardy assessments*

Although importuned to hold that a capricious and arbitrary jeopardy assessment may be enjoined, the Court of Appeals for the Seventh Circuit has stuck to the 1932 rule of *Miller* v. *Standard Nut Margarine Company*, 284 U.S. 498, that a suit to restrain the collection of a tax will lie only if it is alleged that the tax is illegal and special and extraordinary circumstances exist to bring the case within some acknowledged head of equity jurisdiction.

Because there was no allegation of illegality in the present case, the Court reversed the district court's grant of an injunction, which had been entered after the Government refused to comply with the taxpayer's request under Rule 34 of the Federal Rules of Civil Procedure to produce documents, reports and memoranda relating to the assessment against it. The Court noted that §7421 of the Internal Revenue Code of 1954 provides that (with certain exceptions) "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". It said that to avoid the bar of that statute, the tax must be alleged to be illegal and special circumstances must exist.

The taxpayer argued that the capriciousness and arbitrariness of the assessment, which it charged was put at a "fantastic and insupportable figure" to create the appearance of jeopardy, was enough to make the assessment void.

(*Homan Manufacturing Company, Inc.* v. *Long*, United States Court of Appeals, Seventh Circuit, February 17, 1959, Schnackenberg, J.)

## Labor Law . . .
### *organizational picketing*

Appellate courts in two states—Ohio and Illinois—have affirmed that state courts are without jurisdiction to enjoin organizational picketing unless it is mass picketing or is violent. Both the Supreme Court of Ohio (with three judges dissenting) and the Appellate Court of Illinois for the Third District have ruled that federal pre-emption of the labor relations field precluded lower courts from barring the picketing by injunction.

The Ohio Court observed that decisions of the United States Supreme Court established that organizational picketing is either protected activity or an unfair labor practice under the National Labor Relations Act and as either it is within the exclusive jurisdiction of the National Labor Relations Board. And it makes no difference, the Court said (citing the Supreme Court in *Hotel Employees Union* v. *Sax Enterprises, Inc.*, 79 S. Ct. 273), that the Board refuses to take jurisdiction of organizational picketing cases.

The lower Ohio court had issued an injunction banning all picketing. The Supreme Court approved only that part of the injunction proscribing mass picketing and demonstrations or picketing that would prevent ingress and egress of the premises.

The victim of the picketing was a clothing manufacturer that maintains a chain of its own retail stores. The picketing, although for the purpose of inducing the manufacturing workers to join the union, was carried on at retail stores in forty-six cities. Because of

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**Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

this, the three dissenters termed the activity "stranger picketing" and said that there was no support for a finding that it was an unfair labor practice that would place the case exclusively within the jurisdiction of NLRB. The dissenters stated the purpose of the picketing was to require the manufacturer to place the union label in its clothing and that this could have been accomplished without regard to a union-security clause in a contract.

The majority of the Court concluded by saying:

> . . . where, as here, an employer and his employees are perfectly satisfied with existing working conditions and desire no relations with any labor union, why should they have to submit to harassment and persecution in Ohio by outsiders insisting on unwanted unionization and be precluded from resorting to Ohio courts for relief? . . . [T]he answer is found in the decisions of the United States Supreme Court . . . If we are wrong in our conclusion, the Supreme Court of the United States, as our superior in a matter of this kind, may be afforded the opportunity of telling us so.

(*Richman Brothers Company* v. *Amalgamated Clothing Workers of America*, Supreme Court of Ohio, March 4, 1959, Zimmerman, J., 168 Ohio St. 560.)

In the Illinois case the picketing was conducted by Teamster and Machinist locals against a small-town automobile and farm equipment dealer to induce its twelve employees to join the union. Emphasizing that the picketing was peaceful and not *en masse*, the Appellate Court remarked that the rule was firmly established that federal preemption bars a state from enjoining peaceful picketing which affects interstate commerce.

The Illinois Court also referred to *Sax Enterprises* and pointed out that it made no difference whether NLRB "would decline or has declined to exercise jurisdiction". The Court concluded: "In short—whether picketing is considered recognitional or organizational, whether the activities of a union are condemned by the federal statute as an unfair labor practice or by it protected as permissible conduct—state courts may not exercise jurisdiction."

(*Jersey County Motor Company, Inc.* v. *Local Union No. 525, International Brotherhood of Teamsters, etc.*, Appellate Court of Illinois, Third District, March 3, 1959, Roeth, J.)

## Landlord and Tenant . . . *exclusive right*

An intermediate Florida appellate court has taken a crack at a dispute between the Fontainebleau Hotel in Miami Beach and its house doctor, the resolution of which by the trial court was satisfactory to neither party.

The controversy arose over the lease between the hotel and the physician. This provided, among other things, that the doctor would use the leased premises for the practice of medicine and that the hotel would refer its workmen's compensation cases and guests to him. The hotel, claiming the doctor-lessee failed to give its guests and employees proper attention, installed another physician in the hotel and started making references to him. The first doctor sued for injunctive relief and damages.

The reviewing Court agreed with the trial court that the lease did not grant the plaintiff an exclusive right to be the only doctor with offices on the hotel premises. A restrictive covenant as to property retained by a lessor must be evidenced by a clearly expressed intention that was absent in this lease, the Court concluded. It ruled, however, that the hotel had breached the lease by making referrals to the new doctor and that because a purely legal remedy would be inadequate under the circumstances an injunction enjoining the referrals was proper. The Court also agreed that the doctor-lessee was entitled to compensatory damages arising from the referrals, but it declined to go along with the lower court's decision that he also should have punitive damages and that the hotel could not post a sign as to the second doctor's location at the hotel.

(*Fontainebleau Hotel Corporation* v. *Kaplan*, District Court of Appeal of Florida, Third District, January 22, 1959, rehearing denied February 13, 1959, Horton, J., 108 So. 2d 503.)

## Negligence . . . *contractor's liability*

Reversing itself on rehearing, the Supreme Court of Florida has held that a plumbing contractor who installed a wash basin in a motel may be liable for injuries resulting from a fall of the fixture thirteen months after installation. The Court has reversed the trial court's grant of a directed verdict to the contractor, but at the same time has affirmed a directed verdict for the motel operator, who was charged with negligence for failure to maintain the premises in a safe condition.

In its first disposition of the case the Court also had affirmed the directed verdict for the contractor, on the basis of the rule that contractors are not liable to third persons after the work is completed and accepted by the owner. The Court conceded that there was an apparent exception to this rule when the contractor's installation or work creates an inherently dangerous condition, but it concluded that the installation of a wash basin did not raise such a situation.

But on rehearing granted the Court ruled that the exception was not so narrow. It decided that the rule, being based on acceptance of the contractor's work by the owner and the latter's assumption of responsibility, could not apply where the condition created by the contractor is not discoverable by inspection. The Court pointed out that the wash basin apparently fell because it was defectively attached to the wall bracket, and it assumed that this was not discoverable or discovered by the motel operator on inspection. The liability of the contractor is terminated by acceptance of the owner, the Court continued, "only so far as the acceptor is to assume responsibility".

"Where, as in the instant case," the Court declared, "the owner cannot be held to have assumed the risk of a particular defect or danger, then there is no intervening fault to sever the casual relation between the contractor's negligence and the injury, and he should be answerable to the same extent as for any negligent act which involves an unreasonable risk to third parties."

The rehearing opinion also disagreed with the former decision's reliance on the privity doctrine as a support for the rule that a contractor is not liable to third parties who have no

contractural relationship with him for negligence in construction. The Court declared that to impose liability in this case would not in turn impose a "duty to the whole world . . . limited only by the doctrine of foreseeability and ordinary principles of tort law".

The Court's original decision was four-to-one. The opinion on rehearing was written by the dissenter on the first opinion, and adhered to by four other justices. Two, including the writer of the first opinion, dissented on the second.

(*Slavin* v. *Kay*, Supreme Court of Florida, April 16, 1958, on rehearing January 21, 1959, Thomas, J. and Drew, J., 108 So. 2d 462.)

## Taxation . . . *strike benefits*

Strike benefits received by a non-member from a union are gifts and not taxable income, the Court of Appeals for the Seventh Circuit has decided. By so doing the Court has reversed the decision of the District Court, 158 F. Supp. 865 (44 A.B.A.J. 783; August, 1958), which in turn had set aside the jury's verdict.

The Court emphasized that the payments were based on need and were paid to union and non-union strikers alike. It likened them to indigent aid and pointed out that the Commissioner has not taxed disaster victims on the receipt of relief from the Red Cross, nor rehabilitation payments by a large employer to tornado sufferers.

The Court could see no reality in the contention that the benefits should be taxable because the Union exacted continued participation in the strike as a consideration for continued payments. Comparing the $17 a week strike benefit to the taxpayer's $166 a week wages, the Court declared: "The benefits were given because he and his family were in need after he ceased working. Such payments were consistent only with charity. We hold they were gifts and not taxable."

One dissenting judge said he could not escape the conclusion that although the benefits were based on need and paid alike to union members and non-members, they were paid only while the recipients stayed on strike and took no other job. Thus, he said, since compensation for refraining from labor is taxable income the case presented a question of law for the trial judge to decide, and not a question of fact for the jury.

(*Kaiser* v. *U. S.*, United States Court of Appeals, Seventh Circuit, December 22, 1958, Duffy, J.)

## Theaters and Shows . . . *right to eject*

A man who is *persona non grata* at Monmouth Park race course has failed in an attempt to get the New Jersey courts to enjoin the track for excluding him. The Supreme Court of New Jersey has held that he is not entitled to admission on the theory either that the track is a sort of public utility or that his expulsion violated the state's civil rights act.

The defendant's troubles with Monmouth Park began in 1955. On three occasions that summer he was asked to and did leave the track. The fourth time he demurred, was arrested as a disorderly person, but was later acquitted. In 1956 he filed a malicious prosecution suit on that incident. Again in the summer of 1957 he went a couple of times to the track. The second time he was charged with being a trespasser. This did it; he filed a suit for injunctive relief against further exclusion and expulsion.

The race track contended that it had an absolute right under common law to exclude and expel the plaintiff—or anyone else, for that matter. The plaintiff did not dispute that this was the common-law rule, but he argued that it was not available to the track, because through being licensed by the state it had secured "the advantage of a state monopoly" and should therefore not have the common-law right to exclude without a reasonable cause.

The Court agreed with the race track. It said that tracks had invariably been given the same right as theaters to exclude patrons without cause and that a grant from the state to conduct a racing program and parimutuel betting did not alter the rule.

Also rejected by the Court was the plaintiff's alternative contention that the track's action violated the civil rights act, which has in New Jersey been consolidated and extended over the years to cover discriminations in places of public accommodation and amusement based on race, creed, color, national origin or ancestry. The Court said that this statute did not abrogate the common-law right to exclude for other reasons. The plaintiff admitted that officials of Monmouth Park had told him that he was not wanted there because he was "an undesirable, and that his general record and reputation warrant[ed] his exclusion". It was clear, the Court concluded, that the civil rights act did not apply where the discrimination was not based on a ground stated in the statute.

(*Garifine* v. *Monmouth Park Jockey Club*, Supreme Court of New Jersey, January 19, 1959, Jacobs, J., 148 A. 2d 1.)

## Trial Practice . . . *surprise instructions*

A Louisiana television advertising salesman who claimed that a disastrous psychic transformation came over him as a result of observing the havoc caused by a runaway truck has been unable to persuade the Court of Appeals for the Fifth Circuit that he ought to have a new trial. The basis of the appeal was that the trial judge, without warning the plaintiff, used three interrogatories as a form of verdict rather than using a general verdict.

The claim for damage was this: the plaintiff was a bystander when a truck swerved from a highway to avoid hitting a school bus, struck some gasoline pumps and caused fire and widespread destruction. The plaintiff was not injured physically, but he contended that—but, let the Court tell it:

> . . . What happened to him, he says, was that on seeing this holocaust and the need for someone to rush in to help rescue victims, he suddenly became overwhelmed by fear and realized for the first time in his life that he was not the omnipotent, fearless man his psyche had envisioned him to be. His post-accident awareness that this event had destroyed his self-deceptive image of himself precipitated great emotional and psychic tensions manifesting themselves as psychosomatic headaches, pain in legs and neck, a loss of general interest, a disposition to withdraw from society and family contacts, and the like.

The plaintiff's damage picture was somewhat compromised, however, by the fact that after this event his income doubled, he made $25,000 in a real estate trade and he moved into a new $40,000 home. The jury returned a verdict for the direct-action insurer defendant.

As to the plaintiff's principal point on appeal—that he was taken by surprise by the form of verdict—the Fifth Circuit agreed that under Rule 51 of the Federal Rules of Civil Procedure counsel are entitled to know in advance of summation whether the trial judge proposes to use a general verdict or a special-issue verdict. But this rule, the Court said, goes to the assurance of a trial of substantial fairness, and in examining the record, it found that plaintiff's counsel made his final argument in apparent complete awareness of the contents of the verdict form subsequently used. The Court therefore concluded that he was not as surprised as he later claimed.

(*Clegg* v. *Hardware Mutual Casualty Company*, United States Court of Appeals, Fifth Circuit, February 25, 1959, Brown, J.)

## Workmen's Compensation . . . *employee treatment*

The Supreme Court of South Carolina has ruled that the death of a state hospital employee resulting from a penicillin shot given him by a fellow-employee is compensable under the state's workmen's compensation law.

The medication was administered by an employee who had received some medical training at the hospital, but who was not a nurse. She had access to the penicillin, but she was not authorized to give shots except when directed to do so by a physician, although the evidence indicated that she did so to fellow employees. In fact, the commission had found that employee medication by fellow-employees was common. The decedent died of an "acute anaphylactic shock caused by procaine penicillin" which he had requested because he had a sore throat and which was administered while he was on duty.

The Court had little trouble deciding that the death was caused by an accident and arose in the course of employment, but it found the question of whether the death grew out of the employment a close one. "[W]e think the evidence reasonably warrants an inference that it did", the Court concluded. In reaching this result it relied on a finding of the commission that the employee had sought the shot not only to relieve himself but also "to ward off any possibility of passing the infection on to the patients". The Court noted the conflict in American authority on the question, and it warned that its decision should be confined to the facts of the particular case.

(*Portee* v. *South Carolina State Hospital*, Supreme Court of South Carolina, January 14, 1959, Oxner, J., 106 S.E. 2d 670.)

## The Judge Advocate General's School

*(Continued from page 466)*

annual cumulative pocket part to the *Manual for Courts-Martial*. This pocket part is keyed to each paragraph of the *Manual* and is used by the Army in keeping the *Manual* up to date. This department also publishes *The Military Law Review*, a pamphlet designed as a medium for the military lawyer, Active and Reserve, to share the product of his research and experience with his fellow lawyers.

Among the other publications prepared by the department are pamphlets used by law officers in preparing their instructions to the court, pamphlets used by trial counsel and defense counsel in the performance of their duties, and pamphlets prepared especially for commanding officers to aid them in the execution of their responsibilities as convening authorities for courts martial. In addition, six full-length training films have been prepared under the supervision of the department.

Because of the shortage in the Army of qualified court reporters, a six-week course in court reporting has also been established. In this course, enlisted personnel are taught the use of the Stenomask and recording machine for the purpose of recording verbatim the proceedings of courts martial and board proceedings. More than 150 qualified court reporters have been graduated from this course since its inception in January, 1955.

To ensure that the high standards of the School are maintained and to assist in the determination of areas requiring improvement, an annual inspection is made by the Board of Visitors. The Board, composed of five senior reserve officers who are leading practitioners and legal educators,[3] inspects the operations of the School, interviews the students, and sums up its findings, with criticisms and recommendations, in a report submitted at the end of its inspection.

Evidence of the fact that an essential function is being performed is found in the Hoover Commission report on legal services within the Government, which not only recognized the need for such a school but recommended that it be expanded to include the other military services. The Department of Defense concurred in this recommendation and urged that the scope of instruction be broadened to include all fields of military law. Final steps to fully implement these recommendations have not as yet been taken but, as has been previously noted, the beginnings of an interservice facility are already present.

3. Present Board of Visitors: Birney M. Van Benschoten, International Law Counsel, California-Texas Corporation; John Ritchie III, Dean and Professor of Law, Northwestern University Law School; Shelden D. Elliott, Professor of Law, New York University School of Law; Alexander Pirnie, Utica, New York; Robert S. Pasley, Associate Professor and Director of Admissions, Cornell Law School

# Department of Legislation

**Charles B. Nutting,** Editor-in-Charge

**In a previous issue, two legal research projects in the field of atomic energy were described. The following discussion by Senator Anderson, which is a portion of an address delivered by him at the recent Upper Ohio Valley Regional Meeting of the American Bar Association, illustrates the problems in this area as viewed by a legislator. Senator Anderson is chairman of the Joint Congressional Committee on Atomic Energy.**

## *Lawyers, Legislators and the Atom*

*by Clinton P. Anderson*
*United States Senator from New Mexico*

### *Atomic Energy and State and Local Governments*

It has been pointed out many times that the atomic energy industry "grew upside down". Most industries begin on the local level and come under federal regulation only when they begin to spread across state lines and affect interstate commerce. The atomic energy industry, on the other hand, was created during the war under conditions of secrecy and was nurtured and developed by the Federal Government. Now it is becoming more a part of our peace-time economy, and local and state governments—traditionally the protectors of the health and safety of their citizens—are becoming involved.

The Federal Atomic Energy Act provides a comprehensive framework for federal development and regulation but is silent as to the role of the states in regulating the atom.

Indeed, at the present time there is considerable uncertainty, from the legal point of view, as to how far the states *can* go in regulating atomic energy within their boundaries. My lawyer friends tell me that there are two lines of cases, in other areas, on the question whether the Federal Government has "pre-empted the field".

You lawyers can discuss *California* v. *Zook*, 336 U. S. 725, and *Pennsylvania* v. *Nelson*, 350 U. S. 497. To me the general question seems to be: Are the provisions of the Federal Atomic Energy Act "so pervasive that it preempts the field" of regulating the atom?

Faced with this dilemma, the states have to date moved cautiously, but the legal uncertainty still remains.

Ten states have adopted laws similar to the so-called Atomic Energy Co-ordination Act, a model bill recommended by the Council of State Governments. This act establishes an atomic energy co-ordinator as adviser to the governor and directs all state departments to examine their laws and regulations to determine whether they need overhauling to cope with the atom. This appears to me to be a sound and logical first step for a state approaching its new atomic responsibilities.

Seven states (California, Connecticut, Massachusetts, Michigan, New York, Pennsylvania and Texas) have gone farther and adopted so-called comprehensive radiation regulation codes. These regulations set forth maximum permissible doses of radiation, and so forth, and generally parallel the AEC or federal regulations.

Minnesota recently adopted regulations which raise the direct legal or constitutional question. The Minnesota regulations require that before someone constructs a reactor in that state, he must submit the plans of the reactor to the state health officer for examination. The state health officer may require additional plans and information and may delay commencement of construction of the reactor. In addition, the regulations provide that the state health officer must give his express approval before the reactor can begin to operate on its nuclear fuel.

Could a reactor builder who has already obtained a license from the Federal AEC after a lengthy procedure ignore the Minnesota health officer? Could he say: "I have my federal license, and I believe your regulations requiring me also to obtain a state license are invalid, and therefore I intend to build my reactor without regard to your regulations." What if the reactor will be federally owned as at Elk River, but operated by a co-operative like the Elk River Co-op with the conventional facilities owned by the co-op?

A further question arises if, as in the case of the Northern States Power Company, an atomic power plant is built in South Dakota just across the river from Minnesota, where the prevailing winds blow toward Minnesota and particularly Minneapolis and St. Paul. What can Minnesota do about a reactor in South Dakota that might shower a little "fallout" on Minnesota?

How would you, as a lawyer, advise the utility on these matters?

Now I, myself, doubt that any reactor builder would take the attitude of ignoring his own state government or an adjoining one, but the legal and policy questions are still unsettled. Thus there are increasing demands that the Joint Committee and the Congress examine these questions and "spell out" in the Federal Act just how far the Federal Government authority goes, and just how far the state and local governments can go in regulating the atom.

The committee has therefore scheduled hearings in May of this year on federal-state co-operation in the atomic energy field. Perhaps the subject can be broken down into types of activities. For example, one might apply different criteria to the activities of reactor licensing, waste disposal, and transportation, on the one hand, and isotopes and site selection on the other. In some of these areas perhaps the Federal Government should obtain exclusive jurisdiction. In others perhaps the responsibility can be transferred to the states. In still others perhaps concurrent responsibility would be the best solution.

These "jurisdictions" are lawyers' terms. To a layman, the questions could be stated from the federal standpoint

as: Should the Federal Government hang on to its powers, or should it let loose of them, or should it store some of the "powers" in the ice box for later definitive consideration?

But I would urge you, as lawyers, to find out what type of atomic energy laws and regulations your state or local government has adopted or hopes to adopt, and help us evaluate the proper division of responsibilities. I think all of us agree that harmonious and nonconflicting regulations are desired at all levels of government—federal, state and local. The dual goals are to protect the health and safety of the public, and at the same time to develop this new source of energy without subjecting it to unduly burdensome regulations.

### *Employee Radiation Safety and Workmen's Compensation*

A very interesting series of hearings began today before our Subcommittee on Research and development and will continue for two more days this week and three days next week. These hearings are on employee radiation safety and workmen's compensation laws, and we are scheduled to receive testimony from scientists, medical experts and lawyers. It is interesting, in fact, how closely interrelated each of these professions is in the atomic energy field.

From the legal point of view, I might mention that practically everyone agrees that state workmen's compensation acts are, at the present time, quite inadequate, insofar as radiation injuries are concerned. Many of them do not recognize radiation injuries as an occupational hazard and almost all of them have inadequate statutes of limitations. In many cases radiation injuries do not become evident until many years after the employee or the individual was first exposed.

In my opinion, there is an urgent need for each state government to examine its workmen's compensation laws and bring them up to date to accord with the facts of life in this, the Atomic Age. In addition, each state government should also consider the feasibility of adopting the Atomic Energy Co-ordination Act recommended by the Council of State Governments.

### *Liability and Tort Problems—Indemnity and Insurance*

I have already mentioned an atomic energy legal problem, which is an old friend and a favorite "brain twister" for lawyers: that of tort and liability problems in the event of a reactor accident. The Joint Committee has grappled with this problem for a number of years. We have received testimony to the effect that the probabilities of a reactor accident are very remote, but that the liability claims could exceed $5 billion in property damage alone if such an accident should occur. (What a field for the lawyer of tomorrow!) The damages would not be caused by an explosion, as in the case of an atomic bomb, but through the release of radioactive materials from the core of the reactor, much like fallout from a weapon, which would contaminate the countryside for miles around.

The legal question of the liability of the reactor owner has not yet been tested in the courts. We cannot say with certainty yet whether a reactor operator will be held liable only for negligence, or whether he must assume absolute liability under the old English rule of *Rylands* v. *Fletcher*. No doubt the injured plaintiffs will argue that the reactor owner was operating a "dangerous instrumentality" and therefore that he is absolutely liable for any damages incurred by a reactor accident, even without proof of negligence on his part.

In 1957, when Congress enacted the indemnity amendments to the Atomic Energy Act of 1954 (generally referred to as the Price-Anderson amendments), it avoided—and wisely so in my opinion—these difficult questions of liability, but instead set up a governmental indemnity framework to make available funds to protect the injured, regardless of whom the courts should find liable. The necessity for governmental action arose because of the possibility of extensive damages, far exceeding the amounts which private insurance firms, even through pools, were able to offer. Under the Price-Anderson Act formula, an operator of a large nuclear power plant is required to obtain the maximum available private insurance, up to $50 or $60 million, and above that amount the Government will provide an indemnity of $500 million. The statute then provides a limitation of liability procedure and permits apportionment of claims above that amount. In the event a serious reactor accident went beyond the half billion limit, petition could also be made to Congress for special reimbursement, as in the case of the Texas City disaster several years ago.

The purposes of the Price-Anderson Indemnity Act were twofold; first, to protect the public by providing indemnity funds; and second, to encourage private industry to design and build reactors without fear of possible huge liability claims which could bankrupt any reactor company.

In 1958, after hearings, Congress amended the Price-Anderson Act in two respects. First, with respect to non-profit educational institutions, it was provided that AEC could waive the normal requirement of private insurance coverage, in order that these institutions could participate in the program. Secondly, the Act was extended to cover nuclear liability claims arising out of the operations of the *NS. Savannah*, our first nuclear-powered merchant ship, even in its operations outside the continental limits of the United States.

This brings me to a legal "brain twister" of international proportions. Many of our private industrial companies are manufacturing reactors, or reactor parts, for installation abroad, particularly in Western Europe under the new Euratom program. Some of these manufacturers are worried about indemnity problems. What happens if a reactor manufactured in the U.S.A. has an accident ten years later, for example, in Belgium, releasing radioactivity causing extensive damages in The Netherlands and France, as well as Belgium? No doubt many of the injured persons would be sorely tempted to seek to establish liability on the part of the American manufacturer, or even on the part of the U. S. Government which had furnished the nuclear fuel.

Last year, in the Euratom Co-operation Act of 1958, the Congress added a special Section 8 providing that the U. S. Government would assume no

liability by virtue of its assistance in the Euratom program. At the present time, serious efforts are being made to encourage the European countries, or the Euratom six-nation community itself, to enact some sort of an international liability convention or treaty which would provide protection to suppliers, similar to the protection provided by the Price-Anderson Act for suppliers of reactors constructed in this country. I am glad to report that some progress is being made in this direction, and that both the six-nation Euratom community, and the thirteen-nation OEEC organization have drafted conventions and agreements which should help resolve these difficult international indemnity questions which might arise out of the operations of nuclear reactors.

# BAR ACTIVITIES

The American Bar Association's Section of Bar Activities has just announced that the 1959 Award of Merit Competition is under way. Entry forms and rules for the competition may be obtained by writing Co-ordination Service, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. All entries must be postmarked by June 30, 1959.

The competition was established twenty-one years ago to pay special tribute to outstanding state and local bar associations. This year awards will be given in five divisions:

(1) State bar associations with more than 2,000 members.

(2) State bar associations with less than 2,000 members.

(3) City and county bar associations with more than 800 members.

(4) City and county bar associations with 100 to 800 members.

(5) City and county bar associations with less than 100 members.

All bar association officers are invited to publicize the contributions of their association to both the legal profession and the public by entering the competition. Awards will be made during a special ceremony at the opening of the 82d Annual Meeting of the American Bar Association in Miami Beach, Florida, on August 24.

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The Immigration and Nationality Committee of the Federal Bar Association is sponsoring a workshop at the Hotel Statler, Washington, D. C., on May 23.

Anthony L. Montaquila, of the Board of Immigration Appeals, will be the moderator at the morning session on "Methods of Adjusting Status of Aliens", and the speakers will be John M. Lehman, of the Immigration Service, and David Carliner, of Washington, D. C. Jack Wasserman, of the District of Columbia Bar, and John T. White, of the Department of State, will speak on "Naturalization and Expatriation of United States Citizens", with Lewis A. Carroll, Assistant United States Attorney, Washington, D. C., as the moderator.

Following a luncheon, the subject of the "World Refugee Year" will be considered with Robert McCollum, of the Department of State, and Ugo Carusi, former Commissioner of Immigration, as guest speakers, and Thomas J. Griffin, of the Board of Immigration Appeals, as moderator.

A fee of $5 includes the luncheon and workshop participation.

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The Cleveland, Ohio, chapter of the Federal Bar Association is planning to conduct a one-day seminar on the Robinson-Patman Act. It will be held on Friday afternoon, May 8, in the Sheraton-Cleveland Hotel, beginning at 1:30 P. M.

The speakers will be: Sherman R. Hill, Director, Bureau of Investigation, Federal Trade Commission; George L. Derr, formerly with the Antitrust Division of the United States Department of Justice and now counsel with the General Motors Corporation; Allen C. Holmes, Cleveland, Ohio; and Vernon E. Taylor, Attorney in Charge, Cleveland Office, Federal Trade Commission.

The registration fee will be $7, which will include refreshments.

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The State Bar of California plans to break ground this summer for its two office buildings: in San Francisco near the Civic Center at Franklin and McAllister streets, and in Los Angeles on the south side of Third between Bixel and Boylston streets near the Union Oil Center.

Graham L. Sterling, Jr., of Los Angeles, President of the State Bar, announced that the architectural firms of Hertzka and Knowles and of Austin, Field and Fry, respectively, were preparing final plans for the buildings in San Francisco and Los Angeles.

The cost of land and buildings in the two cities is estimated at $900,000. Both buildings will be paid for by California lawyers over the next ten years through a temporary dues increase which the Legislature authorized last year. The State Bar arranged a ten-year loan through the California Bank of Los Angeles for interim financing.

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Federal judges from Illinois, Indiana and Wisconsin, and members of the Bar Association of the Seventh Federal Circuit will meet for the circuit's annual conference at the Knickerbocker Hotel, Chicago, May 6 and 7.

Chief Judge F. Ryan Duffy of the United States Court of Appeals will preside at the conference. Business meetings will be conducted by District Judge William J. Campbell and Kenneth F. Burgess, President of the Seventh Circuit Bar Association.

A joint session will hear talks by United States Supreme Court Justice Tom C. Clark, Chief Judge Duffy, and Warren Olney III, Director of the

Administrative Office of the United States Courts.

The morning program will include a discussion on the new Interlocutory Appeals Act and the new federal jurisdiction amendments by Edward H. Hickey, of Chicago, and Marvin E. Klitsner, of Milwaukee, co-chairmen of the Rules and Practice Committee.

L. Duncan Lloyd, of Chicago, Meetings Chairman, has scheduled a luncheon at noon Wednesday to honor Chief Judge Duffy of the Court of Appeals for his contribution to and excellent administration of that court, at which Justice Clark will preside.

A panel discussion on Court Congestion and Delay, led by Professors Harry Kalven, Jr. and Hans Zeisel, of the University of Chicago Law School, will be heard Wednesday afternoon. They are co-authors of *Delay in the Courts*, a book to be published this year.

Wednesday evening appellate and district court judges from the tri-state circuit will be guests at a circuit bar association banquet. The principal speaker will be William P. Rogers, Attorney General of the United States.

Luncheon tickets are $4.50 for each day. Tickets for Wednesday's banquet are $7.00. Reservations may be made with L. Duncan Lloyd, 135 South LaSalle Street, Chicago 4, Illinois.

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Plans are almost completed for the formation of an International Legal Aid Association, according to an announcement made by Orison S. Marden, of New York, Co-Chairman of the organizational committee of the International Bar Association.

The office will be located in a European city, and the association will be incorporated, as a charitable organization and affiliated with the International Bar Association, as the National Legal Aid and Defender Association is related to the American Bar Association.

The purposes of the association will be:

1. To compile and maintain a directory of the agencies, both public and private, which have been established in each country for the purpose of providing legal aid service in and out of court;

2. To exchange information concerning the nature and scope of the service provided by such organizations and concerning the treaties, laws and other provisions regulating legal aid in the various nations;

3. To develop facilities and procedures for the referral of cases on a basis of reciprocal service among the co-operating agencies;

4. To encourage the establishment of legal aid services in all countries where they may be needed, and to cooperate with bar associations, the judiciary, social welfare agencies and other international organizations that are interested in extending and improving legal aid and defender services.

The committee has been assured that funds from private foundations (most of which have already been subscribed) will be adequate for the first two years of operation. William T. Gossett, of Detroit, former Chairman of the American Bar Association's Standing Committee on Legal Aid Work, is chairman of the fund-raising group.

The International Bar Association adopted a resolution in 1956 recommending the establishment of an international agency and appointed a committee to formulate plans. At its 1958 meeting in Cologne, William H. Avery, of Chicago, on behalf of the American delegation, and with the support of the committee, proposed the plan that was adopted.

Mr. Marden stated that the organization should be completed within the next few months.

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The following item from a bulletin of the Akron (Ohio) Bar Association, might serve as a warning to those arranging medicolegal seminars:

"An autopsy performed at the Medical Seminar for lawyers in Richmond, Virginia, in October disclosed a murder before the eyes of the lawyer audience.

"The corpse, fished from the James River the day before, was intended merely to serve for instructional purposes, but in the midst of the examination by Dr. Geoffrey T. Mann, State Medical Examiner, it was found that the middle-aged man had been shot by a .22 caliber pistol. The body was immediately removed from the autopsy room and a less embarrassing cadaver substituted."

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The first issue of *Hawaii Bar Journal*, a quarterly publication, has been published by The Bar Association of Hawaii. The format and cover are attractive, and the *Journal* carries, besides the leading articles, the following departments: U. S. District Court Decisions, edited by Harry T. Tanaka; Supreme Court Decisions, edited by Gilbert E. Cox; Circuit Court Decisions, edited by Carrick H. Buck; District Court Decisions, edited by Bruce M. Clark; Attorney General's Opinions, edited by David K. Nakagawa; and City and County Attorneys' Opinions, edited by Hiroshi Oshiro. V. Thomas Rice is the Editor-in-Chief of the publication.

The cover of the January issue (Volume 1, Number 1) is in two colors and carries a picture of a statue of King Kamehameha.

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Malcolm Eliot Long, a member of the American Bar Association and of the Bar of Michigan, who practices in Paris, France, has been elected President of the Lawyers' Intergroup of the Academy of International Law of The Hague for the year 1958-1959.

# Tax Notes

**Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.**

## *Splitting of Ordinary Income from Patents and Copyrights*

*By Ralph H. Dwan, Washington, D.C.*

In recent years there has been so much concentration upon capital gains that the tax planning problems of individuals with respect to ordinary income from patents and copyrights have been rather neglected.[1] In the case of patents, it is quite delightful to take advantage of the capital gains provisions of Section 1235 of the Code. Or it may be possible to achieve a capital gain transaction outside of Section 1235[2]. Section 1235 does not apply to copyrights, and the opportunities of authors for capital gains existing at the time of the publication of certain famous books were closed off by the Revenue Act of 1950.[3]

It is not always feasible or desirable as a business matter to cast patent transactions into a capital gain pattern. The best business way of exploiting a patent may be by non-exclusive licenses. Indeed, a suit for infringement is often filed in order to get the defendant to talk seriously about such a license. Royalties from such a license arrangement will be ordinary income taxable at progressive rates.[4] There are possibilities of ameliorating the impact of the tax by income spreading and income splitting.

Income spreading is designed of course to keep the individual taxpayer out of the higher brackets which would apply if the income were all bunched in one or two years or so. If the litigation referred to above goes to judgment, Section 1304 of the Code, added in 1955,[5] spreads the income (compensatory damages only) backward in effect by limiting the tax to the increases which would have resulted if the amount had been included in gross income in equal installments for each month of infringement of the patent. In the absence of litigation or where litigation is settled before judgment,[6] the provisions of Section 1302 of the Code may result in a limited spreading back of income (and those provisions apply also to copyrights). However, the requirements of that section are difficult to meet, especially the 80 per cent provision. Spreading forward probably[7] may be achieved by the terms of a license agreement. Of course, one must weigh the tax advantages of spreading against any credit risk in deferred payments—a bird in the hand may be worth more than several tax advantages in the bush.

Advantageous income spreading may sometimes be combined with income splitting, although each may be worthwhile separately. Income splitting, if successful, serves the same purpose of avoiding the higher bracket taxes on ordinary income of individuals by putting the income into the hands of more taxpayers. Although no longer so important for income tax purposes as between husband and wife, this topic still has income tax significance with respect to transactions between other members of the family.

With this much by way of introduction to the principal subject of this note, it may be well to consider two recent[8] cases bearing upon the possibilities and pitfalls of splitting of ordinary income from patents. In *Commissioner* v. *Reece*,[9] the taxpayer-inventor had in 1929 assigned his patent rights to an independent corporation, to which the patent was issued, in exchange, among other things, for a "royalty" for each article sold which was covered by the invention. In 1935 he made a gift assignment to his wife of all his interest under the contract with the corporation. The case involved the year 1947, in which the wife received "royalty" income, which the Commissioner attributed to the inventor-husband. In the Tax Court brief the Commissioner conceded that the income was capital gain.[10] In affirming the Tax Court, the First Circuit Court of Appeals held that the income was not attributable to the husband-inventor. Chief Judge Magruder distinguished the well-known Supreme Court cases on "anticipatory arrangements" on the ground that the sale of the patent rights to the corporation substituted a new kind of property interest which could be given away so that the income thereafter was taxable to the donee.

The other recent case is *Heim* v. *Fitzpatrick*[11] in the Second Circuit. The facts were quite similar to those in the *Reece* case, the principal differences being that the corporation was a family corporation and the gifts were of only part of the inventor-taxpayer's interest in the contract with the corporation. Specifically, he transferred 25 per cent to his wife, 25 per cent to a son, and 25 per cent to a daughter. The District Court, without relying on

1. See generally Wallick, *A "Sale or Exchange" of Patent Rights for Federal Income Tax Purposes*, 23 G.W.U. L. Rev. 456 (1955); Greenbaum, *Tax Problems of Authors and Inventors*, 13 N.Y.U. Inst. on Fed. Taxation 87 (1955); Bailey, *The Inventor*, 15 N.Y.U. Inst. on Fed. Taxation 285 (1957); Creed, Bangs and Driscoll, *Federal Taxation of the Inventor*, 2 The Patent, Trademark, and Copyright Journal of Research and Education 505 (1958). Other articles of general interest are cited below on particular points.

2. Reg. 1.1235-1(b); see *Coplan* v. *Commissioner*, 28 T. C. 1189, acq. I.R.B. 1958-29, 6, Rev. Rul. 58-353, I.R.B. 1958-29, 15; Mortenson, *Patent Royalties—Capital Gain or Ordinary Income*, Taxes, The Tax Magazine 787 (1958).

3. §210(a), amending §117(a)(1) of the 1939 Code. The present provision of the 1954 Code is §1221(3). The story is told at length by Judge Wright in *Stern* v. *U. S.*, 164 Fed. Supp. 847 (1958), aff'd. ... F. 2d ..., 59-1 U.S.T.C. ¶9271.

4. *John Randolph Hopkins* v. *Commissioner*, 15 T. C. 160, 164 (1950).

5. Public Law 366, 84th Cong., 1st Sess. §1.

6. §1304 does not apply where no judgment is entered. Reg. §1.1304-1(b)(1)(iv).

7. As in deferred compensation cases, the Commissioner might contend that the taxpayer received an economic benefit in the year the contract was executed. See Greenbaum, *The Professional Writer*, 15 N.Y.U. Inst. on Fed. Taxation 269, 277 (1957). However, the risk seems small where the parties are dealing at arms length.

8. The earlier cases are ably discussed in DeBois, *Patents and Taxation*, 7 Okla. L. Rev. 416, 430-433 (1954); see also 71 Harv. L. Rev. 378 (1957), discussing the lower court opinion in the *Heim* case.

9. 233 F. 2d 30 (1956).

10. 24 T.C. 187, 188 (1955).

11. ... F. 2d ... (2d Cir., 1959), 59-1 U.S.T.C. §9251. Certiorari denied.

the fact that the assignee of the patent rights was a family corporation, nevertheless concluded that all the income was attributable to the inventor-donor, apparently as ordinary income. Judge Anderson said that this was not a case of a "tree" (using Justice Holmes' famous figure of speech in *Lucas* v. *Earl*)[12] being transferred together with the fruit; rather, in his view, the patents, not the contract, constituted the "tree". On January 26, 1959, the Court of Appeals reversed the judgment, the opinion being written by Judge Swan, who stated that the "question is not free from doubt". The scope of the decision is somewhat limited by the observation in the opinion that "more than a bare right to receive future royalties" was assigned to the donees. In the contract with the corporation, the inventor had retained the power to bargain as to royalties on new developments, and that power had been assigned and exercised by the donees. Also the inventor had retained a reversionary interest in the invention and patents in the form of an option to cancel the agreement if certain conditions were not fulfilled, and that interest was also assigned. The court concluded:

> . . . We think that the rights retained by plaintiff and assigned to his wife and children were sufficiently substantial to justify the view that they were given income-producing property.

Judge Swan also distinguished the decision of the Supreme Court in *Commissioner* v. *Sunnen*.[13] In the *Sunnen* case, decided in 1948, the inventor-taxpayer was also the patentee. He entered into non-exclusive license agreements with a corporation of which he was president; he owned 89 per cent of the stock and his wife owned most of the rest of the stock. The corporation agreed to pay a royalty of 10 per cent of gross sales, with no minimum. Each party could cancel the licenses upon notice, of six months in one agreement and one year in others. The inventor-taxpayer assigned to his wife all right, title and interest in the license contracts as gifts. In agreeing with the Tax Court's conclusion that the assignments were ineffective to divert the income from the inventor-taxpayer, Justice Murphy, for the Court, stressed four considerations: (1) the position of the inventor-taxpayer in the corporation gave him power to cancel the contracts by giving the necessary notices; (2) his position also permitted him to control sales and thus the amount of royalties; (3) he remained the owner of the patents and could grant licenses to other firms; (4) there was no substantial change in the inventor-taxpayer's economic status. In the *Heim* case, Judge Swan contrasted the 89 per cent of the stock owned by the inventor-taxpayer in *Sunnen* with the 1 per cent owned by Heim. In the latter case, the wife and daughter owned 68 per cent and the active heads of the corporation were the son and son-in-law. The court concluded that no inference could reasonably be drawn that the daughter would be likely to follow the advice of the father rather than that of the husband or brother.

The two recent cases may well establish a pattern which it is reasonably safe to follow, and yet there are lingering doubts about whether the *Sunnen* case has been sufficiently distinguished. The Commissioner's nonacquiescence[14] in the Tax Court's decision in the *Reece* case is still outstanding as this note is written.

The more cautious lawyers will seek ways of making assurance doubly sure. In the *Reece* case, Judge Magruder gave an example, which he thought the Government would surely concede: the taxpayer-inventor assigned his patent right to his wife, who had the patent issued to herself and then sold the patent right to the corporation. Thus it would be safer to assign the patent right, or the patent itself, before a royalty contract is made. Even better would be an assignment of the patent before negotiations for the royalty contract had started or at least before definite terms had been reached. That would avoid questions of form versus substance such as those in the corporate liquidation cases of *Court Holding*[15] and *Cumberland*.[16] On the other hand, an assignment of an undivided fractional interest in the patent right should have *pro tanto* the tax effect of an assignment of the entire patent right; that would follow *a fortiori* from the *Heim* case. Moreover, an assignment in trust should be just as effective in diverting income from the settlor, subject to the usual tax rules on trusts.[17]

The cautionary measures suggested in the preceding paragraph can be taken only if legal tax advice is sought by the inventor or his patent lawyer while there is still some room for maneuver. A good maxim on that is, "The sooner, the quicker."

Finally, similar considerations apply to literary property and copyrights.[18] In fact, Judge Anderson, in the lower court opinion in the *Heim* case, relied upon two *Wodehouse*[19] copyright cases in the Second and Fourth Circuits. In the Second Circuit case, Wodehouse had assigned to his wife an interest in a story, *i.e.*, an undivided half interest in the "manuscript and the copyright therein". He mailed the assignment to his attorney, who notified the literary agent of Mrs. Wodehouse's interest in any contracts made. The author was held not taxable on the royalties received by the wife under a contract with a publishing company. The court stressed the fact that the donor, the author, had no contract right to royalties when he made the gift to his wife. In the Fourth Circuit case, Wodehouse had assigned to his wife a one-half interest in two other stories after they were completed but before publication or copyright. The literary agent was notified of the assignment, but the court pointed out that the publisher was not notified. The court also mentioned the existence of a joint bank account, although the evidence did not show where the royalties from the books were deposited. The majority of the court concluded that, for tax purposes, the assignments lacked economic reality and the entire income was taxable to the author. In so doing, the majority agreed with the dissent in the Second Circuit; a dissent agreed with the majority in the Second Circuit.

Those 1949 *Wodehouse* decisions, as

12. 281 U. S. 111 (1930).
13. 333 U. S. 591 (1948).
14. C.B. 1956-1, 6.
15. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331 (1945).
16. *U. S.* v *Cumberland Public Service Co.*, 338 U. S 451 (1950).
17. See *Morris Cohen* v. *Commissioner*, 15 T.C 261 (1950).
18. See Greenbaum, *The Professional Writer*, 15 N.Y.U. Inst. on Fed. Taxation 269, 279-280 (1957).
19. *Wodehouse* v. *Commissioner*, 177 F. 2d 881 (2d Cir., November 21 1949); *Wodehouse* v. *Commissioner*, 178 F. 2d 987 (4th Cir., December 21, 1949).

precedents, probably should be considered as modified by the recent patent cases discussed above. On the other hand, a transfer or assignment *before* any royalty contracts are made is still the safer course, especially in the field of literary property and copyrights.[20] Moreover, in view of the reasoning in the Fourth Circuit *Wodehouse* case, the publisher should be notified of the assignment, and the reality of the transfer should be made clear by completely separate bank accounts[21] and other separate accounts. In appropriate cases, the transfer may be of the right to exploit a copyright in one medium only, *e.g.*, movies.[22]

In conclusion, the methods of splitting ordinary income are quite similar for patents and for copyrights, and in due time probably will be practically identical. It is primarily the job of the patent and copyright lawyers to determine what courses are feasible and what documents are needed for the purpose.[23] Informed legal tax advice can be helpful on timing, phraseology, and other cautionary measures.

20. See *Sax Rohmer* v. *Commissioner*, 14 T.C. 1467 (1950); Pilpel, *Developments in Tax Law Affecting Copyright in 1954*, TAXES, THE TAX MAGAZINE 271, 274 (1955).

21. See *Morris Cohen* v. *Commissioner*, 15 T.C. 261, 267 (1950).

22. See Rev. Rul. 54-409, C.B. 1954-2, 174; Greenbaum, *The Professional Writer*, 15 N.Y.U. INST. ON FED. TAXATION 269, 279-280 (1957); Pilpel, *Tax Law Affecting Copyrights: 1954-1956*, TAXES 76 (1957).

23. Also such matters as filing an instrument of transfer in the U. S. Patent Office. See Yater, *The Effect of the Internal Revenue Code of 1954 on the Sale or the Exclusive License of a Patent*, JOURNAL OF THE PATENT OFFICE SOCIETY 156, 163 (1955).

# Activities of Sections

## SECTION OF ADMINISTRATIVE LAW

The current issue of *The Student Lawyer* features an article on "Administrative Law—New Legal Horizons for the Young Lawyer" by Section Chairman John B. Gage. The article was designed to acquaint younger lawyers with the challenges and creative opportunities afforded by participation in the work of the Section.

Chairman Gage has appointed the following Nominating Committee for the Section: Rufus G. Poole, Simms Building, Albuquerque, N. M., Chairman; Fanney N. Litvin, 2800 Quebec Street, N.W., Washington 8, D. C.; and Bryce Rea, Jr., Munsey Building, Washington 4, D. C. This committee must, under the by-laws of the Section, submit its report to the Chairman of the Section in time for it to be published in the *Administrative Law Bulletin* prior to the Annual Meeting in August.

## SECTION OF ANTITRUST LAW

At the Regional Meeting of the American Bar Association held at Pittsburgh, on March 12, the Section presented a very successful half-day session. It was addressed by Robert A. Bicks, First Assistant, Antitrust Division of the Department of Justice, Earl W. Kintner, General Counsel of the Federal Trade Commission, and Jerrold G. Van Cise, of New York City. A stimulating question-and-answer period followed.

A task group under the chairmanship of the first Chairman of the Section, Edward R. Johnston, of Chicago, has made a study of the committee organization of the Section. All the former Chairmen of the Section served on this task group. Its report was made to the Council on April 9 at the beginning of the annual spring meeting of the Section in Washington, D. C. It resulted in the creation by the Council of a number of new committees and subcommittees. Among these is a new Committee on State Antitrust Laws. Leroy Jeffers, of Houston, Texas, has been appointed as its chairman.

A Committee on Legislation was also authorized and Marcus A. Hollabaugh, of Washington, D. C., has been appointed as its chairman. Its function will be to keep abreast of proposed legislation in the antitrust field, assign each item to the appropriate chairman for committee study and recommendations and to keep the chairmen informed of legislative developments.

Chairmen and vice chairmen of the Section committees attended the meeting of the Council. Reports were made of committee activities, including the activities of various committee chairmen to implement resolutions which had been adopted by the House of Delegates regarding various measures pending in Congress. Plans were approved for the program for the 1959 Annual Meeting at Miami, Florida.

Following the Council meeting, a cocktail hour and banquet were held in the Presidential Room of the Statler Hotel. It was one of the best attended in the history of the Section. Hubert Hickam, Chairman of the Section, presented as Master of Ceremonies at the banquet Stanley N. Barnes, formerly Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice and now a Judge of the Court of Appeals for the Ninth Circuit.

On April 10 the day was given over to a seminar on "Practice and Procedure before the Federal Trade Commission (A Peek Behind the Silken Curtain)".

The principal speakers from the Federal Trade Commission were Commissioners Edward T. Tait and Sigurd Anderson and Messrs. Alfred G. Seidman, L. Edward Creel, Jr., and Frank Hier. Private practitioners who spoke were Albert R. Connelly, of New York City, and Edward F. Howrey, of Washington, D. C.

Panelists from the Federal Trade Commission were Harry A. Babcock, James E. Corkey, Everett F. Haycraft, Sherman R. Hill, Earl W. Kintner, Robert M. Parrish and Joseph E. Sheehy.

Other panelists were Robert A. Bicks

of the Department of Justice, and H. Thomas Austern, of Washington, D. C., Cyrus Austin, of New York City, Hammond E. Chaffetz, of Chicago, Robert W. Graham, of Seattle, Francis R. Kirkham, of San Francisco, Breck P. McAllister, of New York City, and Curtis C. Williams, Jr., of Cleveland. Also on the panel were Professor Robert W. Austin of Harvard University and Professor S. Chesterfield Oppenheim of the University of Michigan. Concluding remarks were made by Commissioners William C. Kern and Robert T. Secrest and Chairman of the Commission, John W. Gwynne.

The panel was presided over by Milton Handler, Chairman of the Information and Education Committee of the Section, who, with the assistance of Jerrold G. Van Cise, Vice Chairman of the Section, and Earl W. Kintner, General Counsel of the Federal Trade Commission, planned and co-ordinated the program.

The program was very well attended and enthusiastically received.

The Chairman announced the appointment of the Nominating Committee as follows: Cyrus V. Anderson, One Gateway Center, Pittsburgh, Pennsylvania, Chairman, Edward R. Johnston, of Chicago, Illinois, and C. Brien Dillon, of Houston, Texas. Under the Section's amended By-Laws members of the Section, during the sixty-day period following the April 9-10 meeting, may make suggestions to the Nominating Committee of persons suitable for nomination by the committee. The Nominating Committee will make its report at the August, 1959, Annual Meeting at which there will be elected a Vice Chairman (who will automatically become Chairman at the 1960 annual meeting) and three members of the Council, each to serve for a three-year term.

## SECTION OF CORPORATION, BANKING AND BUSINESS LAW

At the February meeting of the Section's Council a number of important matters were considered. The creation within the Banking Committee, which is under the Chairmanship of Carl Funk, of Philadelphia, of a Subcommittee on Savings Banks was authorized. That subcommittee is now being organized. It will deal with an area of the law which heretofore has not been covered specifically in the Section. The Section's Committees on Banking and on Savings and Loan Associations are very active. Both consider matters which relate incidentally to the savings banks field, but the Section will now have a committee with specific responsibility for the distinctive problems of the savings bank, which are distinguishable from commercial banks generally and from savings and loan associations.

The Section participated in bringing about the formation of the Association's Special Committee on Federal Liens. It was constituted from representatives of the Corporation Section, the Section of Insurance, Negligence and Compensation Law, the Section of Real Property, Probate and Trust Law, and the Section of Taxation. After extended consideration with all interested groups, including the Treasury Department, of the very difficult problems involved, the Committee reported to the House of Delegates last February. The report was approved and the Committee has been authorized by the House of Delegates to urge upon the proper committees of the Congress the enactment of amendments to the federal laws which will carry out the recommendations contained in the report. A limited supply of the report is available for purchase by members of the Section at $1.00 per copy. Requests for copies may be made to Farrington B. Kinne, Executive Secretary of the Section, American Bar Association, Chicago 37, Illinois.

At the Regional Meeting held in Pittsburgh, March 10-13, the Section presented programs arranged by Vice Chairman George D. Gibson. The Committee on Savings and Loan Associations under the Chairmanship of David A. Bridewell, of Chicago, conducted an all-day forum on savings and loan association problems. The speakers were: G. R. Parker, President, Federal Home Loan Bank of Pittsburgh; Milton I. Baldinger, Chairman, Attorneys' Committee, United States Savings and Loan League; T. Bert King, Washington Counsel, United States Savings and Loan League; William C. Prather, Associate Counsel, United States Savings and Loan League; Boyd Ewing, General Counsel, Missouri Savings and Loan League; Kenneth G. Heisler, General Counsel, National League of Insured Savings Associations; David A. Bridewell, Chairman, Savings and Loan Association Committee, and member of the Committee on Federal Liens, American Bar Association; Thomas H. Creighton, Jr., General Counsel, Federal Home Loan Bank Board; and Lewis G. Groebe, of Chicago, Illinois.

The Committee on Corporate Law Departments, of which Leon E. Hickman, Aluminum Company of America, is Chairman, presented a program entitled "Corporate Counsel and the Bar". The speakers were Joseph T. Owens, of the Pittsburgh Plate Glass Company, representing the corporate counsel side of the discussion, and Ezra Cornell, of New York City, representing the outside counsel point of view. The moderator was John S. Tennant of United States Steel Corporation. The Section's Committee on Small Business presented a program on small business financing. The speakers were Donald J. Evans, of Boston, Chairman of the Committee; Carl W. Funk, of Philadelphia, Chairman of the Section's Committee on Banking, and John Floyd of the Small Business Administration.

## SECTION OF INTERNATIONAL AND COMPARATIVE LAW

The Council of the Section met during the Midyear Meeting of the Association in Chicago and made plans for the Section's participation in the Regional Meeting held in Pittsburgh and for its annual Spring Meeting in Washington.

The Section's program during the Pittsburgh Regional Meeting was in the form of a forum held on March 13, with Lyman M. Tondel, Jr., of New York, presiding as chairman. The subject of the forum was entitled "International Disputes and Interna-

tional Tribunals." G. W. Haight, of New York, spoke on the subject, "The Nature of Disputes Arising from America's International Business". Professor Louis B. Sohn of Harvard Law School spoke on the subject "International Tribunals Available for Settling Disputes".

Arthur H. Dean, of New York, led the forum discussion after these addresses and among those participating in the discussion and question period were Professor Collier of the University of Cincinnati, and John G. Buchanan, Vice President of the American Law Institute.

The Section will hold its annual spring meeting in Washington at 11:00 A.M. on Tuesday, May 19. Sir Leslie K. Munro, Ambassador of New Zealand to the United States and former President of the United Nations General Assembly, will be the speaker at the luncheon meeting, which will be followed by a space law program.

David F. Maxwell, of Philadelphia, Chairman of the Section's Committee on the Law of Outer Space, will preside, and the speakers scheduled to discuss various aspects of space problems include U. S. Senator Kenneth B. Keating, of New York; Rear Admiral Chester C. Ward, of Washington, Judge Advocate General of the U. S. Navy; and Dr. Hugh L. Dryden, Deputy Administrator of the National Aeronautics and Space Administration.

The luncheon and the meetings will be held in the Federal Room, Statler Hotel, and reservations for the luncheon may be made by writing to Mrs. Helen Clagett, 4501 Connecticut Avenue, N.W., Washington 8, D. C.

The last *Bulletin* (December, 1958) of the Section carried an article by Eugene D. Bennett of San Francisco entitled "Comparison of United States and Foreign Antitrust Law"; an article by Leo M. Drachsler, of New York, entitled "The British Statute of Frauds—British Reform and American Experience", a report on the address of the French Ambassador to the United States, Hervé Alphand, at the Los Angeles luncheon meeting of the Section; and Part I of a survey of international law organizations.

## SECTION OF JUDICIAL ADMINISTRATION

Considerable portions of the midyear meetings in Chicago of the Executive Committee and the Council were devoted to discussion of the organization of the Section's committees and the functions of the new Administrative Assistant and Director of State Activities, Ben MacKinnon, with the aim of making the Section's program more productive and efficient.

John M. Lynham, an attorney in private practice in Washington, D. C., was elected to the Council to fill the unexpired term of the late Bolitha J. Laws. Mr. Lynham has been active in the Section for several years and is currently serving as Chairman of both the Committee on Arrangements and the Committee on Judicial Review of Administrative Decisions.

Reports of several of the Committees to the Council contained matters of special interest.

Judge Richard Hartshorne reported that the *State Grand Jury Handbook* and the *Federal Grand Jury Handbook* have been completed and approved for publication by the Board of Governors. West Publishing Company has generously agreed to print the handbooks and preparations are being made to distribute them to the approximately 2,100 state judges and 250 federal judges in charge of grand juries.

Considerable progress was reported also by Chairman Ivan Lee Holt, Jr., of the Committee on a Model Judicial Article. Judge Holt stated that his Committee hoped to have a draft prepared for the Council's consideration at the Annual Meeting, based upon an unique collection of the judicial articles of all the states which has been compiled for the Committee under the direction of a committee member, Professor Philip D. Kurland of the University of Chicago Law School.

In another field of activity, the Council approved a recommendation of the Committee on Judicial Review of Administrative Decisions for a preliminary study to be made of that field with the assistance of George Washington University Law School. On the basis of this pilot study the Committee will recommend particular features of the process of judicial review to be studied by the Section with a view toward effecting useful improvements in this phase of the administration of justice.

The interest shown in a panel discussion of impartial medical testimony presented by the Section at the Upper Ohio Valley Regional Meeting of the American Bar Association on March 11 is one illustration of the active consideration which is being given to the idea in many cities. At the meeting in Pittsburgh, the creation and operation of the medical expert plan which has been in use in New York City since 1952 was described in detail from the points of view of the two co-operating professions—Presiding Justice Bernard Botein of the Appellate Division, First Department, Supreme Court of New York, spoke for the judges; and Dr. Preston A. Wade, a member for seven years of the panel of participating physicians, gave an analysis of the system from the doctor's viewpoint. Both speakers agreed that use of the plan had met with success and widespread support in New York City.

The third speaker on the panel, Judge Francis Van Dusen, U. S. District Court, Eastern District of Pennsylvania, reported the initiation of a similar plan in that court in June of 1958. During much of the period since its inauguration the plan has been undergoing a test to determine the court's authority to adopt such a rule. Judge Van Dusen reported that the validity of the court's rule had recently been established when the United States Supreme Court refused to review a decision of the Court of Appeals for the Third Circuit approving the rule. Judge Van Dusen indicated that his court felt confident that the plan would make a useful contribution to the just and efficient disposition of personal injury cases.

Reports from various parts of the country indicate that bar associations, medical associations, and courts in several of the metropolitan areas are considering the adoption of impartial medical testimony plans. One has been proposed in Cleveland and others are under active consideration in Minneapolis and Chicago. Both the federal

and state courts in Pittsburgh have been awaiting with interest the outcome of the litigation over the plan adopted in the Eastern District of Pennsylvania. A panel of experts has been organized and in partial use in Los Angeles for about a year. Expressions of interest have also been received from Cincinnati and St. Louis, and studies are under way in Rhode Island and New Jersey.

## SECTION OF LABOR RELATIONS LAW

The Section of Labor Relations Law participated in the very successful Upper Ohio Valley Regional Meeting on Friday, March 13, at Pittsburgh. The participation of the Section took the form of a panel, the subject of which was the problems of management and labor union lawyers. The panel was composed of William J. Isaacson, of New York, Section Chairman: Louis Sherman, of Washington, D. C.; Howard Lichtenstein, of New York, and Tracy H. Ferguson, of Syracuse, New York. Professor Paul R. Hays of Columbia University acted as the moderator. Professor Hays propounded the questions which normally beset the management and union lawyers. The questions ranged from those which are presented on an organizational campaign to the enforcement of the collective agreements. Whitney North Seymour, candidate for President-Elect of the American Bar Association, concluded the session with a brief address.

## SECTION OF MUNICIPAL LAW

The Municipal Law Section will hold its Annual Meeting at the Beau Rivage Hotel in the Bal Harbour section of Miami Beach on August 24, 25 and 26. This is an unusually beautiful resort hotel with its own salt water beach and a large fresh water pool on landscaped grounds. The hotel also provides parking for automobiles and will grant such favorable summer rates that it is expected that most of the members of the Section who attend the meeting will take advantage of its facilities. In that way not a moment will be lost between work and pleasure. Plans for the Section meeting are being formulated under the Chairmanship of Giles J. Patterson, of Jacksonville, Florida.

## SECTION OF MINERAL AND NATURAL RESOURCES LAW

A number of members of the Mineral and Natural Resources Law Section will participate in the Fifth Annual Rocky Mountain Mineral Law Institute proceedings in Salt Lake City, Utah, July 30 and 31 and August 1. The meeting will be opened by John P. Akolt, President, Rocky Mountain Mineral Law Foundation, and Calvin A. Behle, General Chairman. Elmer Bennett, Under Secretary of the Interior and Chairman of the Section's Committee on Public Lands, will address the group on the afternoon of July 30 on the subject "Jurisdiction, Powers and Attitude of the United States Department of the Interior on Conservation of Oil and Gas" On the same afternoon Patrick M. Westfeldt, of Denver, R. Lauren Moran, of Riverton, Wyoming, and Raymond B. Holbrook, Past Section Chairman, will participate in workshop presentations.

On July 31, James D. Voorhees, of Denver, will present a paper entitled "Financing Oil and Gas Operations on Credit", while Ben R. Howell, of El Paso, will discuss "Natural Gas Purchase Contracts". A. Frank Smith, of Houston, will discuss the subject of "The Proportionate Reduction Clause, After-Acquired Title and Warranties", to conclude the afternoon session.

There are a number of other interesting subjects which will be covered at the Institute proceedings by other members of the Bar, who are not members of the Mineral Law Section, which should be attractive to all of those interested in mineral and natural resources problems. Section Chairman R. E. L. Hall is a trustee of the Rocky Mountain Mineral Law Foundation and will attend the Institute proceedings at Salt Lake City.

Program Chairman A. W. Walker, Jr., of Dallas, Texas, has requested all Committee Chairmen to complete their recommendations for participation in the Section program at the Annual Meeting in Miami Beach this August. The Section Chairman has announced that a Mineral and Natural Resources Law Section central headquarters and hospitality area will be established on the Mezzanine-Balcony section of the Singapore Hotel. The purpose of the hospitality area is to provide a central meeting place for Section members from Sunday, August 23, through Wednesday, August 26, during the hours from 9:00 A.M. until 6:00 P.M. each day. Coffee, light refreshments and conversation will be the order of the day at the Section headquarters on the Mezzanine-Balcony. The business sessions of the Section will be held in the Malayan Room of the Singapore Hotel.

## SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

At the midyear meeting in Chicago, the Council and Committee Chairmen of the Section met for an entire day on February 21, reviewing the progress of the committee work and the plans for the Annual Meeting in Miami Beach.

The Section participated in the Pittsburgh Regional Meeting of the American Bar Association and furnished a half-day workshop on March 12 at which a question-and-answer program was geared to informing the practicing lawyer on problems in all three fields of law under the jurisdiction of the Section. The Division Chairmen, William E. Schuyler, James F. Hoge and John Schulman answered questions posed by four general lawyers: Louis H. Artuso, William H. Eckert, Ella Graubart and George D. Lockhart.

The Section is grateful to the Committee on Federal Judiciary headed by Bernard G. Segal, of Philadelphia, for its assistance in encouraging the appointment of another patent lawyer as an Associate Judge of the U. S. Court of Customs and Patent Appeals. The appointment of Arthur H. Smith, of Detroit, Michigan, an active member of this Section, now gives the Court two patent-trained judges out of the five now on the Court.

# OUR YOUNGER LAWYERS

Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

### *Jaycees—J.B.C. Joint Law Day Observance*

At the invitation of J.B.C. Chairman Kirk M. McAlpin, the U. S. Junior Chamber of Commerce has undertaken to join forces with the J.B.C. in urging the 3,700 Jaycee chapters throughout the nation to join with lawyers and local citizens in observance of Law Day.

May 1, designated Law Day, U.S.A., is a most propitious occasion for the celebration of the American concept of freedom and justice under law as opposed to the May day celebrations of the Communist world, boasting of its might through suppression of individual freedoms. Chairman McAlpin has urged all young lawyers throughout the nation to combine in making the 1959 Law Day observance a rededication to the basic premise that ours is a government of laws and not of men. The details of what young lawyers and young lawyer groups can do to assist in this program were featured in the recent issue of *The Young Lawyer*, the official publication of the Conference which is circulated to all members. James R. Stoner, of Washington, D. C., District of Columbia Circuit Representative on the Executive Council of the Conference, and a National Director of the Jaycees, is in charge of coordinating the efforts of the two nationwide groups.

### *Important Legislative Meeting*

Chairman McAlpin visited in Washington, D. C., on March 31, with Stuart Udall, representative from Arizona, who is sponsoring the J.B.C.'s compensation for assigned counsel and public defender option legislation for federal courts in the Congress (H.R. 4609). The Congressman requested McAlpin to provide concrete examples of cases in which this legislation would benefit young lawyers. Members of the Conference are urged to write Kirk (P.O. Box 566, Savannah, Georgia) concerning their personal experiences in defending indigent criminals in federal courts where this legislation would contribute to a more adequate defense. These examples will be presented to the Judiciary Committees of the Congress as testimony for the hearings to be held in May.

There is a great need for this type of legislation. Recently McAlpin received a letter from Henry Baskin, of Detroit, Michigan, which illustrates the point. Mr. Baskin said in part:

> Legislation of this type is of extreme interest to me in that I most recently completed, as appointed counsel, a trial of some ten weeks duration in the Federal Court for the Eastern District of Michigan. As you know, there is no provision to compensate appointed counsel for these cases, and the lack of compensation for even minimum expenses incurred has indeed caused a grave hardship on me.

### *Young Lawyers in Government*

The new Committee on Status of Young Lawyers in Government, brainchild of Edwin S. Rockefeller III, Assistant to the General Counsel of the Federal Trade Commission, held a well-attended luncheon meeting on March 31 in Washington, D. C., acknowledging the J.B.C.'s interest in young lawyers in Government service. Three directors, Kenneth J. Burns, Jr., Chicago, Illinois, James M. Ballengee, Philadelphia, Pennsylvania, and James J. Bierbower, Washington, D. C., and Chairman McAlpin, and council member James R. Stoner, Washington, D. C. were present at the luncheon. McAlpin stressed the importance of the work of the committee, after which George M. Coburn, committee vice chairman, office of the General Counsel, Department of the Navy, outlined the purpose and plans of the committee.

Among the current undertakings of the committee is the dissemination of information about job opportunities for young lawyers in the Federal Government, both in Washington and throughout the country. It is estimated that at least 10,000 civilian lawyers are currently on the Government payroll, and several hundred join the ranks each year. This ambitious project will

**Conference officials meet with Congressman Stuart L. Udall (Ariz.), sponsor of compensation for assigned counsel-public defender option legislation. Left to right: Conference Director James M. Ballengee, Director Kenneth J. Burns, Jr., Legislation Committee Chairman Walter F. Sheble, National Chairman Kirk McAlpin, State Presidents Reception Committee Chairman Lawrence McN. Johnson and Congressman Udall.**

**Government Lawyers Committee Meets. Left to right: Kirk McAlpin (JBC National Chairman), Lawrence McN. Johnson (President, North Carolina Young Lawyers Section), Edwin S. Rockefeller, III (Chairman, Government Lawyers Committee), Kenneth J. Burns, Jr. (JBC Director), Andrew J. Valentine (Vice Chairman, Government Lawyers Committee), Elizabeth A. Elward (Secretary, Government Lawyers Committee), James J. Bierbower (JBC Director), George M. Coburn (Vice Chairman, Government Lawyers Committee), James M. Ballengee (JBC Director), Seymour Knox Hale (Vice Chairman, Government Lawyers Committee), Robert Becker (Vice Chairman, Government Lawyers Committee), and James R. Stoner (Executive Council Adviser).**

entail obtaining a list of job opportunities from the various agencies and, once obtained, making this information available on a current basis through a Washington, D. C., clearing house and J.B.C. publications. The first publication is slated for July.

In addition, and in furtherance of the purpose of the committee, a tentative draft of a questionnaire polling federal lawyers regarding conditions in the legal profession in Government service was discussed and a final draft approved which will be in the mail shortly.

### *St. Louis Honors A.L.S.A.*

The Junior Section of the St. Louis Bar Association sponsored a luncheon in honor of the delegates to the Eighth Circuit Meeting of the American Law Student Association, held March 13 and 14 under the auspices of the St. Louis University School of Law. Credit for this most successful meeting is due in a large measure to the efforts of Dan McAuliffe, Vice President of the A.L.S.A., who was in charge of arrangements for the meeting. One of the highlights at the luncheon meeting was the very well received talk of Chairman McAlpin, on an occasion which presented an opportunity to the Conference to express its keen interest in our law students as future members and leaders.

In attendance at the luncheon meeting were delegates from the following law schools: St. Louis University School of Law, Washington University School of Law, University of Minnesota School of Law, University of South Dakota School of Law, University of Iowa School of Law, Drake University School of Law, University of Missouri School of Law, and Kansas City University School of Law.

## Notice of Elections of Junior Bar Conference Officers

The annual election of officers and council representatives of the Junior Bar Conference for the year beginning with the adjournment of the annual meeting will be held in Miami on August 24, 1959. Officers to be chosen are Chairman, Vice Chairman and Secretary. Representatives will be elected to the Council from the First, Third, Fifth, Seventh, Ninth, Eleventh, and District of Columbia Districts.

Nominating petitions for each of the above positions must be submitted on or before June 15, 1959. Each petition shall be endorsed by at least twenty members of the Conference; endorsers of a nominee for the Council shall be residents of the district in respect to which the petition is submitted. Each petition shall contain a brief biographical sketch of the background and qualifications of the candidate.

Petitions for the three national offices shall be submitted to the National Chairman, Kirk M. McAlpin, Box 566, Savannah, Georgia, *and* to the National Secretary, William Reece Smith, Jr., Box 3239, Tampa, Florida. Petitions for the council posts should be submitted to the respective incumbent council representatives and conformed copies shall also be forwarded to the National Chairman and Secretary. The incumbent council representatives for the districts as to which vacancies must be filled are as follows:

First—Donald J. Evans, 84 State Street, Boston 9, Massachusetts

Third—Paul L. Jaffe, 1518 Packard Building, Philadelphia 2, Pennsylvania

Fifth—J. Rex Farrior, Jr., Box 3324, Tampa, Florida

Seventh—John S. Rendleman, Southern Illinois University, President's Office, Carbondale, Illinois

Ninth—Calvin H. Udall, First National Bank Building, Phoenix, Arizona

Eleventh—Lewis A. Dysart, Baltimore Building, Kansas City, Missouri

District of Columbia—James R. Stoner, 1405 G Street, NW, Washington 5, D. C.

This notice is given pursuant to the provisions of Article VI, Section 6.1 of the by-laws.

WILLIAM REECE SMITH, JR.
*Secretary*

# *Practicing Lawyer's guide to the current* LAW MAGAZINES

**Arthur John Keeffe, Washington, D.C., Editor-in-Charge**

ADMIRALTY: Professor Milton Conover of the Seton Hall Law School in Newark, New Jersey, has an interesting study of the expansion of admiralty jurisdiction from control of water that ebbs and flows with the tide to "embrace all navigable waters". His piece is entitled, "The Abandonment of the 'Tidewater' Concept of Admiralty Jurisdiction in the United States", and appears in the December, 1958, issue of the *Oregon Law Review* (pages 34-53; Eugene, Oregon; $1.50 per copy). In 1825 in *The Steamboat Thomas Jefferson*, 23 U. S. 428, Mr. Justice Story established the tidewater concept, and Chief Justice Roger Brooke Taney demolished it in *The Propeller Genesee Chief* case in 1851. Professor Conover's article is the more delightful to me because of its footnotes. Footnote 17 cites the late Judge Putnam's article in 10 *Cornell Law Review* and it was my pleasure to appear before him with Otey McClellan in C. C. Burlingham's office long ago. The judge as a youngster took charge of telegraphing for Cleveland in many languages Blaine's famous "Rum, Romanism and Rebellion" remark. In footnotes 1, 12 and 16, Professor Conover cites Professor Gus Robinson's hornbook on admiralty and this will please the old Pirate as it does me. The father of Professor Robinson had many interesting experiences in the United States Navy, one of which is the subject of a chapter entitled, "Five Against the Sea" in Hanson Baldwin's great book *Admiral Death* (published by Simon & Schuster, 1939).

AMISH MEN: When the item on the Amish appeared in the February issue of the JOURNAL (45 A.B.A.J. No. 2, page 192), my good friend Torrance Brooks, of the Cattaraugus, New York Bar, was inspired to write his aging "perfesser" as follows:

> I was very much interested in your comment in the February issue about the "Amish men". About thirty or forty families of the Amish from near Akron, Ohio have moved into the farming area near Cattaraugus. My associate, Richard Dirkx (Cornell, '56) is a member of the school board in the district in which the Amish people have settled. They are refusing to send their children to the public school. They maintain their own private school for their own children through the eighth grade. The teacher in their private school has only an eighth grade education herself. The school is not recognized by the New York State Education Department. At the present time the State Education Department is threatening to discontinue state aid to the Pine Valley Central School unless they take steps to force the Amish children to attend. My law associate is wondering what will happen here in New York. He has also heard that more of the group in Akron may move to New York in view of the status of the Ohio law at the present time.
>
> I believe that this group of Amish people have split off from the Pennsylvania group and from all appearances did not take with them the farming know-how which is displayed at Lancaster, Pennsylvania. Our group seems to have more problems and less prosperity.

At Cornell, long ago, I wrote my second law review article with Torrance Brooks, then the father of five children, and William Grier, now of the White Plains, New York, Bar, and a good article it was, thanks to those fine fellows. It was entitled "86 or 100" so the title would fit on the cover, and it points out faults in New York State procedure that persist to this day and argues in vain for New York to join the church and adopt the Federal Rules of Civil Procedure.

BILL OF RIGHTS: Edward Dumbauld, now a Judge in the Common Pleas Court of Fayette County, Pennsylvania, author of *The Bill of Rights Today*, published in 1957, has a valuable study of the "State Precedents for the Bill of Rights" in Volume 7, Number 2 of the *Journal of Public Law*, published by Emory University Law School, at Atlanta 22, Georgia. Single copies are two dollars. I have read the Judge's piece with great pleasure and profit.

CORPORATION LAW: Volume XI, No. 4, of the *University of Florida Law Review* for the winter of 1958 (Gainesville, Florida, $2.00) is a 208-page symposium on corporation law. Ray W. Richardson, Jr., of the Florida Bar, writes on "Formation of Corporations in Florida" (pages 395-432); Professor Leonard S. Powers, of Duke Law School, on the "Close Corporation" (pages 433-473); Professor Robert B. Mautz, of Florida Law School, with the aid of Gerald W. Rock, a Florida Law School student, on "Management" (pages 474-508); and Professors James J. Freeland and Richard B. Stephens, of Florida Law School, on "Corporate Taxes" (pages 509-598).

Of especial interest to readers throughout the country is this last comprehensive article dealing as it does with the federal income taxation aspects of the preceding articles. Although the article on corporate formation is mainly concerned with Florida law, the remainder of the issue will be of interest to a national audience.

FEDERAL FIELD PRE-EMPTION: Perhaps no decision of the Warren Court has evoked more discussion than the reversal of the conviction of Steve Nelson by Pennsylvania under that state's Sedition Act. In his paper entitled, "Supersession and Subversion: Limitations on State Power To Deal

with Issues of Subversion and Loyalty" published in a special supplement of the *University of Chicago Law School Record* (Vol. 8, No. 1, August, 1958; price: $2.00; address: Chicago 37, Illinois) Professor Roger C. Crampton gives a splendid analysis of the holding of the Court in the case. He points out that "Nelson is apparently the first case in which the Supreme Court has held that a federal criminal statute, not involving a regulatory scheme under the commerce clause, supersedes, in the absence of conflicting provisions, the enforceability of a concurrent state criminal statute." The Pundit concludes "the Court erred (1) in failing to examine critically the applicability of the 'tests of supersession' drawn from commerce clause cases, and (2) in failing to reckon in serious fashion with the saving clause of 18 U.S.C. 3231." However, Professor Crampton believes "the result, if not the rationale, in Nelson" can be justified on the theory that sedition like treason "involves a matter within the exclusive competence of the federal government".

Chief Justice Warren at the end of his opinion in *Nelson* stated that in the absence of specific congressional statement the Court should not presume that Pennsylvania could also prosecute in this field, as, if it did, double convictions for the same crime would result. Professor Crampton discusses this and argues that, while states should be allowed to prosecute for "bank robbery, assault on a federal officer, theft from a post office and the like", they should no longer be permitted to punish other overlapping offenses, "such as interference with federal recruitment, desecration of the United States flag, impersonation of a federal officer and the like". Query whether he is right in this?

Professor Crampton expressed the view that in *Abbate* v. *United States*, 247 F. 2d 410, and *Bartkus* v. *Illinois*, 7 Ill. 2d 134, 130 N.E. 2d 187, the Supreme Court would reverse *United States* v. *Lanza*, 260 U. S. 377, and outlaw federal and state convictions for the same crime. As he put it, "It does not seem unlikely that the *Lanza* rule will be overturned and that the States will be forbidden to prosecute a person acquitted of the same act after a Federal trial." Alas, I thought so also and when one is in error it is nice to have such distinguished company. On March 30, 1959, the Supreme Court reaffirmed the *Lanza* case and upheld the convictions of *Abbate*, Docket 7, and *Bartkus*, Docket 1. While the Court's opinion does not discuss the *Nelson* case, the dissent of Mr. Justice Black in the footnotes refers to it several times. *Bartkus* puts a different light on *Nelson* and the vote six to three, with only the Chief Justice and Justices Black and Douglas dissenting, would seem to embalm for a spell not only *Lanza* but the rule that the Bill of Rights does not apply in *haec verbae* to the states.

FEDERAL-STATE RELATIONSHIP: The Conference of Chief Justices of the States commissioned Professor Philip B. Kurland, of the University of Chicago Law School, as a consultant in August of 1957. Thereafter and prior to the issuance of their report entitled, "Federal-State Relationships as Affected by Judicial Decisions" in August of 1958, Professor Kurland and four of his colleagues (Professors Francis A. Allen, who writes on criminal law; Roger C. Crampton, on subversion; Allison Dunham, on commerce and federal questions; Bernard D. Meltzer, on labor relations; and, Professor Kurland himself on process and distribution of judicial power) at the University of Chicago Law School prepared and submitted studies of different phases of the problem to the Conference. These studies have now been published by the *Chicago Law School Record* in a special supplement issued in the Autumn of 1958 (Vol. 8, No. 1; price: $2.00; address: Chicago 37, Illinois). Each is extraordinarily well done and I cannot recommend their acquisition too highly.

GOVERNMENT SECRECY: Milton M. Carrow, of the New York Bar, has written a valuable article with respect to the right of the Government to withhold information. It is entitled "Governmental Nondisclosure in Judicial Proceedings" and appears in the December, 1958, issue of the *University of Pennsylvania Law Review* (Vol. 107, No. 2, pages 166-198; $1.50 per single copy; Philadelphia, Pennsylvania).

In footnote 2, Mr. Carrow refers to the fine hearings of Congressman John E. Moss and his able counsel, John Mitchell. This same footnote refers also to the memorandum of the Attorney General sent on May 17, 1954, by President Eisenhower to the Secretary of Defense in connection with the Army-McCarthy hearings. However, the footnote omits to state that the author of the memorandum was my classmate, Herman Wolkinson of the Department of Justice, and that the substance of his study appears in 10 *Federal Bar Association Journal*, April to October, 1949, at pages 103, 223 and 319 ("Demands of Congressional Committees for Executive Papers").

Mr. Carrow's paper is the more timely in that the Supreme Court at the present term has heard two cases with respect to the right of the Government to keep secret the names of informers in security cases (Docket 504, *Charles Allen Taylor*, and Docket 180, *William L. Greene* v. *McElroy*). The *Taylor* case was argued on March 31, 1959, and the argument was interestingly reported by Anthony Lewis, of the *New York Times* on April 1, 1959 (page 13). The *Greene* case was argued

the following day and Mr. Lewis reported that argument also in the *Times* on April 2, 1959 (page 12). Mr. Carrow discusses the *Greene* decision at the D. C. Circuit, 254 F. 2d. 944, certiorari granted, 27 *U. S. Law Week* 3134. He also discusses the prior cases, such as *Dayton* v. *Dulles*, 254 F. 2d 71, reversed 357 U. S. 144, and *Jencks* v. *United States*, 353 U. S. 657.

HOT CARGO: There is an excellent editorial note by Michael J. Long in the *University of Cincinnati Law Review* for the winter of 1959 (Vol. 28, No. 1, pages 73-79; single copy $1.50; address: Cincinnati 21, Ohio) with respect to the so-called secondary boycott provision of the Taft-Hartley Act (the Labor Management Relations Act of 1947, Section 8(b) (4) ). Mr. Long's study is the more valuable in that he traces the legal interpretation from decisions by the National Labor Relations Board (*Conway's Express Co.*, 87 N.L.R.B. 972; *Pittsburgh Plate Glass Co.*, 105 N.L.R.B. 740; *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769; *Sand Door and Plywood Co.*, 113 N.L.R.B. 1210; and *American Iron and Machine Works Company*, 115 N.L.R.B. 800) to the review of the *Sand Door* and *American Iron* rulings by the Supreme Court of the United States in *Local 1976, United Brotherhood of Carpenters, A.F.L.* v. *N.L.R.B.*, 78 S. Ct. 1011. The writer's conclusion is that, "By this decision of the Court, a 'hot-cargo' clause is contractually valid but can be repudiated by the employer with absolute immunity" (page 77). For this reason the dissent stated, "The present decision is capricious" and with this, Mr. Long says, "One almost necessarily must agree." He concludes that a question of interpretation of Section 8(b) (4) will as "a certainty" remain "a troublesome one until the interpretation of the section attains some permanence".

MILITARY JUSTICE: The *JAG Journal*, published by the Judge Advocate General of the Navy, Admiral Chester Ward, with the aid of his Deputy, Captain William C. Mott, under the editorship of Commander Andrew J. Valentine, carries in its March issue an excellent article by Zeigel W. Neff with respect to the work of the Navy Board of Review. Mr. Neff is a member of Navy Review Board One and comes to his present post after a distinguished combat career as a naval aviator in World War II and as a Law Specialist in Korea. His study is divided into six parts: "Jurisdiction", "Membership", "The Officer", "Evidence", "Sentence", and "Prejudicial Errors". An interesting and valuable paper.

ROBINSON-PATMAN ACT: That old Yalee, George Spelvin, has an interesting analysis of the decision of the United States Court of Appeals for the District of Columbia Circuit in the *Simplicity Pattern* case (258 F. 2d 673, *certiorari granted*, 358 U. S. 897). The Supreme Court of the United States held argument in the *Simplicity Pattern* case during the week of March 30, 1959, and when the opinion comes down, it will be fun to reread Spelvin's note against the Court's opinion (pages 808-825, March, 1959, Vol. 68, No. 4, $2.00, 401A Yale Station, New Haven, Connecticut).



SPACE: The *JAG Journal* in its February, 1959, issue carries a symposium devoted to space. There is a foreword by Secretary McElroy. There follow articles by Loftus Becker, the Legal Adviser to the State Department, on "United States Foreign Policy and the Development of Law for Outer Space"; Professor John Cobb Cooper, of McGill University, on "Space Above the Seas"; Admiral Chester Ward, the Judge Advocate General of the Navy, on "Space Law as a Way to World Peace"; Sir Leslie Knox Munro, formerly the Permanent Representative of New Zealand to the United Nations and now official United Nations Representactive To Report on Developments in Hungary, on "The Nations and the Firmament—The World Organization in Man's Quest for Outer Space"; Paul G. Dembling, Assistant General Counsel of "Nasa" ("The National Aeronautics and Space Administration"), on "National Coordination for Space Exploration," a piece that discusses the controversial patent clauses in the procurement contracts of "Nasa"; and by Admiral John E. Clark, Deputy Director of "Arpa" (The Advanced Research Projects Agency) on "Programming for Space Defense". This is a splendid issue and Admiral Ward, Captain Mott and Commander Valentine deserve great credit for it. Single copies can be had for twenty-five cents each and a subscription for $1.25 by writing the Superintendent of Documents at the Government Printing Office, Washington 25, D. C.

## The Way of the Law

*(Continued from page 485)*

rangements made and to be made, tested and to be tested, sustained and to be sustained.

So we come to the third aspect of the subject which I venture to touch on tonight, namely the fact that there is an immense amount of actual legal work to be done, right now, and mainly, of course, by lawyers. And let me add, emphatically, in most cases for a proper fee. We are not talking about part-time do-goodism; we are talking about doing the world's work, full-time, with the highest professional competence.

The work needs to be done for its own sake, for the weaving of the fabric of law. But it is equally important for the sake of public understanding: every step taken to put some part of international affairs under law is a demonstration to the public of the uses of the law.

Examples of legal work to be done could be drawn from literally every field of human activity—from outer space to internal medicine. I will choose two large examples—one, in the field of world business, the other in international politics.

As to the economic organization of the world, we have long been involved in "foreign aid" and will continue to be. But for years some of us have been saying that far, far more important than any amount of "hand-outs" would be a stern, no-fooling effort to establish adequate rules for international investment and trade. Have our words been lost in the wind? They seemed to be—but now, here too, the power of a right idea makes its way. Our recent eminent visitor from South America, President Frondizi of the Argentine, tells us with enthusiasm that the future of the Argentine's economy is based on respect for law. And now, most importantly of all, there lies on the agenda of international affairs a really fundamental proposal worked out by the No. 1 banker of Germany, Mr. Hermann Abs. Mr. Abs calls his proposal a Magna Charta for trade and investment throughout the world. Every enlightened American corporation should back that Magna Charta—whether or not it is engaged in foreign trade. Corporations need the advice and the prodding of their lawyers to see the profound importance of the Abs proposal. For at stake there is the prosperity of the world—and our prosperity. At stake there is the future of free enterprise—at home no less than abroad. At stake there may even be the peace of the world, since nothing could so vitalize the rule of law as to have it extended to all business transactions everywhere on earth. This would give to millions of people the habit of abiding by the law, or trusting in the law, and of prospering in the trust and confidence which only the law can give. The law both as the tremendous first principle, and the law seen also as the moderator of daily life.

In the field of international politics, the example I would take is arbitration agreements. All during the nineteenth century there was a steady advance in the use of arbitration. In fact, American use of this technique began with the founding of this country. You will remember that in 1794 the Jay Treaty between Great Britain and the United States provided for the arbitration of certain issues arising at the end of the Revolutionary War, including the boundary between Maine and Nova Scotia. The negotiations were successful and the results were accepted. In the one hundred years that followed, a total of 177 disputes between nations were resolved by arbitration and the United States was involved in seventy-nine of them. And remember: all this was done without any supra-national policeman with a big club.

The high tide of faith in arbitration as a means of having peace with justice was probably marked by the Hague Conference of 1907—about the time

Andrew Carnegie set up his Peace Foundation with every expectation that war would be abolished long before now. But then came the breakdown of the West in 1914—and since then one has heard less and less of arbitration. The reason was, in part, a basic loss of faith that nations and governments would keep their word. *Pacta sunt servanda*—agreements must be kept. The way to restore faith in good faith is to make more agreements, to make them carefully, and to keep them.

But arbitration agreements are only a part of the fabric of lawfulness throughout the world. The fabric can be even more strongly woven by developing regional courts. Why not, for example, a court with a developing body of law to settle *all* disputes, without exception, in the Western Hemisphere? A marvelous thing for the new world and a splendid example to the old.

Meanwhile, there is the World Court of the United Nations—the most unused court in history. As President Eisenhower indicated in his message, we cannot proceed to advance the rule of law until we do our part to make that Court a little more useful than it is. That means that the Connally Amendment must be repealed. Since that amendment bears the name of a beloved Texas Senator, I think we should call upon the members of the Texas Bar to make it their special job, with all respect to Old Tom, to amend that amendment.

The agenda, of which I have merely suggested a very few examples, are vast. If it is to be mainly your work, how will it relate to mine? As an editor, I have reason to know that the American people's appetite for facts is ravenous. But I also know—and the people know—that facts by themselves, facts in their "innumerable swarmings", are meaningless. Facts about the world, facts about the contemporary United States, facts about our nation's activities in the world, become significant only as they are attached to a theme, a line of effort, a vision of the truth. As an editor presenting the news of America and the world, I need a clear theme. And so does the reader. So do we all—all the people.

But the theme cannot be contrived. It must be deeper far than propaganda. It must be found actually running through the operations of our society and its government. I think the theme now lies half-hidden, half-visible in the actual American experience. We may agree with those who point out that the American destiny has been largely shaped by the particulars of place and time; that much of our experience as a nation and many details of our way of life are peculiar to us—and will remain so. But the *essentials* of the American experience *can* be communicated. First of all, we must understand them more clearly ourselves in order to communicate them to the world.

More than ever, and on the broadest scale, the appropriate theme for America is liberty under law—and this is our opportunity to work in the world. It is this theme, developed from its highest moral principles down to its most practical aspects, that can define the role that the United States must play in the world. And it can restore to us all an ample sense of the meaning and purpose of life in America, in the world, from day to day—and into the farthest reaches of vision and prophecy.

## The Papers of the Executive Branch

*(Continued from page 470)*

does not affect the congressional right to information. For *McGrain* v. *Daugherty* holds that the authority to obtain information is an essential attribute of the powers appropriate to the legislative department.

In truth, if the separation of powers has anything to tell us on the subject under discussion, it is that the Congress has the right to obtain information from any source—even from officials of departments and agencies in the Executive Branch. In the United States there is, unlike the situation which prevails in a parliamentary system such as that in Britain, a clear separation between the Legislative and Executive Branches. It is this very separation that makes the congressional right to obtain information from the Executive so essential, if the functions of the Congress as the elected representatives of the people are adequately to be carried out. The absence of close *rapport* between the Legislative and Executive branches in this country, comparable to those which exist under a parliamentary system, and the nonexistence in the Congress of an institution such as the British question period, have perforce made reliance by the Congress upon its right to obtain information from the Executive essential if it is intelligently to perform its legislative tasks. Unless the Congress possesses the right to obtain Executive information, its power of oversight of administration in a system such as ours becomes a power devoid of most of its

practical content, since it depends for its effectiveness solely upon information parceled out *ex gratia* by the Executive.

### *IV. Conclusion*

If the prior portions of this article have demonstrated anything, it is that the claim of an Executive privilege to restrict the Congress's access to its papers has no legal justification. It is supported by neither statutes nor judicial precedents. It must rest, therefore, solely upon inherent authority. But the vague claim of Executive prerogative (even assuming *arguendo* that it may be valid as a matter of internal administration where only private parties are concerned) must surely give way before the clear constitutional power of the Congress to seek information. Otherwise the admitted congressional powers of legislation and oversight would be at the mercy of a department or agency when the information necessary to intelligent exercise of those powers happened to be in the possession of such department or agency.

To be sure, departments and agencies have a natural desire to be wholly free of investigatory demands. But the possibilities of administrative inconvenience here are surely outweighed by the overriding public interest in having the affairs of the Government carried on free of the "paper curtain" of official secrecy.

The claim of the Attorney General that the Government cannot carry on its business if its internal workings are fully subject to congressional inquiry is not a new one. A similar pretension was raised in court in one of the great state trials of eighteenth-century England. There, counsel for the Governor and Council of the East India Company sought not to produce the council records, because, said he, it would lead to "many inconveniences and ill consequences to exhibit the proceedings of the Council in an open court of justice, especially as they may sometimes contain secrets of the utmost importance to the interest and even to the safety of the state".

The court rejected this claim of privilege, saying:

> We are not surprised that the Governor General and Council should be desirous to prevent their books being examined, which might tend to the consequences they mention. . . But at the same time it is a matter of justice that, if they contain evidence material to the parties in civil suits, they may have an opportunity of availing themselves of it.

To the dangers of abuse adverted to by counsel, the court declared that it itself would ensure that proper use was made of the records produced:

> When it is necessary they should be produced, the Court will take care they are not made an improper use of.[27]

When any individual, from the highest to the lowest, is required to heed the call of justice in the courts—no matter how piddling the particular case—can it be claimed that any public officer is not subject to the even more important demands of the "grand inquest of the nation"? In Bentham's famous words:

> Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney sweeper and a barrowwoman were in dispute about a halfpennyworth of apples, and the chimneysweeper or the barrowwoman were to think proper to call upon them for their evidence, could they refuse it? No; most certainly.[28]

If this is true in a court, how much more true must it be in an inquiry by the elected representatives of the people themselves. "The public", declared Lord Hardwicke, L.C., "has a right to every man's evidence".[29] Shall this be true of the most paltry private-law case, and not of the evidence sought in an investigation authorized by solemn resolution of the people's representatives, in Congress assembled? To assert that Executive and administrative agencies are not subject to the fullest congressional scrutiny is to advance an argument as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. If that position were deemed valid, the fiat of the Executive and not the will of the people, would be the supreme law of the land.

There is no such avenue of escape from the overriding investigatory power of the Congress. Executive agencies being investigated must not themselves determine which of their files and records should be made available; nor must their mere *ipse dixit* be conclusive that their claims of privilege are justified. On the contrary, to the claim of Executive privilege to withhold information from it, the Congress must respond, as once did William Pitt, the elder, "We are called the Grand Inquest of the Nation, and as such it is our duty to inquire into every Step of public management, either Abroad or at Home, in order to see that nothing has been done amiss".[30]

27. *Trial of Maharajah Nundocomar*, 20 How St. Tr. 1057 (1776).
28. 4 BENTHAM'S WORKS 320.
29. 12 COBBETT'S PARLIAMENTARY HISTORY 693.
30. 13 Commons Debates 172. For a more exhaustive treatment of the subject of this paper by the present writer, see the March, 1959, issue of the CALIFORNIA LAW REVIEW.

## Copyright Law

*(Continued from page 426)*

performances, with an attendance not exceeding 750 persons, an average of one hundred persons a performance. There were no other presentations of the play.

On appeal to the District Court of Appeals, the court held that the "evidence was not sufficient to warrant the implied findings that the title *Slightly Scandalous* acquired and retained a secondary meaning in relation to respondent's play".

The Supreme Court of California reversed and held that not only were the damages of $17,500 not excessive, but that the title had acquired a secondary meaning, because it was publicized in three of the largest cities in the country; rehearsals and production were announced in dramatic and motion picture journals in Hollywood and New York; that the small attendance at the performances is only "important in connection with the amount of damages which should be awarded, but it does not determine whether the title has acquired a secondary meaning".

The court further observed that "the record includes testimony to the effect that other titles to unsuccessful plays have been sold for larger amounts. The value of property wrongfully taken is a matter for the determination of the jury and the evidence as a whole supports the award in Jackson's favor"; and that "Popularity is not a requirement for secondary meaning because notoriety and adverse discussion may bring about widespread identification of the play by its title and may pique the public interest. Likewise, advertising, even of an unpopular play, may cause the public to identify it as one which has been a 'Broadway production' ".

On the other hand, in *Herzig* v. *20th Century Fox*, the plaintiff dramatist asked for $250,000 damages and injunction for the use of the title *Vicki*. The federal court denied the plaintiff's application for an injunction, holding that as plaintiff's play was a "flop" it could not be claimed that defendant's use interfered with plaintiff's possible sale of motion picture rights, as the purchase of stage "flops" by a motion picture company is based on the story and not on the title.[37]

### *VII. Foreign Protection of Titles*

While the British theory of the protection of titles to literary works is similar to ours, that is, the prevention of deception of the public, the British grant relief based on "passing off".[38] We, however, are gradually departing from our theory of "palming off".[39]

The British maintain that there must be a "common field of activity" to sustain an action for unfair competition. On that theory, the court denied relief to the publishers of a song, the title of which was used by a motion picture company.[40] Yet, the views of our courts appear to be contra.[41]

There is a paucity of decisions in France dealing with the protection of titles. Most of the controversies are settled under the rules of the various societies of authors, composers and producers. Few disputes are presented to the courts.

"Originality" is the touchstone of French protection. Although a title, as such, is not considered a writing and hence not protected by the laws governing writings, the one who first attaches a word or phrase to a literary product acquires certain proprietary rights therein.[42]

On February 22, 1944, the French legislature formalized this protection, at least in the area of motion picture titles, by establishing a body not unlike our Motion Picture Association of America, and requiring the deposit and clearance of proposed titles.

In some other countries, such as Belgium, Egypt, Mexico, Ecuador, Venezuela and Portugal, there is a varying degree of protection for the title of literary property.[43]

The multilateral international copyright conventions have, with a single exception, omitted any provision for the protection of titles. The exception is the Washington Convention in 1946, which granted a limited protection within the member countries. Protection will be granted when (1) the original work has gained international recognition, and (2) the conflicting title is used on a work of similar kind and character, involving a possibility of confusion. This was merely a statutory declaration of the common law of the United States.[44]

Aside from the purely legal problems, motion picture companies releasing U. S. pictures abroad are busy changing the English titles to make them understandable in foreign countries. For example, when *Guys and Dolls*, the title taken from Damon Runyon's story of that name, was given to the motion picture, the question arose, what are the foreign equivalents? In Hebrew, it is *The Boys and the Attractive Easy-Going Girls:* in French, it is *Blanches Colombes et Villains Messieurs*; in Spanish, *They's and They's* or *He's and She's*. The German equivalent is *Schwere Jungen—Leichte*

37. *Herzig* v. *20th Century Fox* (S.D. Cal. not officially reported). See VARIETY, November 23, 1955.

38. Copinger and Skone James, THE LAW OF COPYRIGHT (9th ed. 1958) pages 87 *et seq.*

39. *Metropolitan Opera Assn. Inc.* v. *Wagner-Nichols*, 101 N.Y.S. 483, at page 491.

40. *Francis, Day & Hunter, Ltd.* v. *Twentieth Century Fox Ltd., supra;* Copinger and Skone James; *op. cit. supra.* note 36, at page 92.

41. "The courts have thus recognized that in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors". *Metropolitan Opera Assn.* v. *Wagner-Nichols*, page 492, *supra*, note 39.

42. *Borel d'Hauterive* v. *Aubert*, June 28, 1847.

43. Joseph S. Dubin, *Motion Picture Rights: U. S. and International*, 28 So. CALIF. L.R. 205 at 214 (April, 1955).

44. REPORT OF THE COUNCIL OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW (Pan American Union, June, 1946).

*Maedchen (Tough Guys and Light-Hearted Girls)*, and in Swedish, *Angels of Broadway*. I am not aware whether a Russian title has been given the picture.

### *VIII. Suggestions*

I will endeavor to summarize briefly the principles applicable in the choice of a title and steps to safeguard its use:

1. Institute a careful search of all prior uses of your proposed title, before making any public announcements of the publication or performance of the work.

2. If your search discloses no prior use for stories, books, plays, motion pictures, music, radio or television, it would be reasonably safe to use the title.

3. Should your search disclose but one use, especially if fairly recent, avoid it; if used, ten or more years ago, it would appear to be safe to use it.

4. Should there be a number of prior uses, but one or more used fairly recently by a recognized author or for a best seller or pocket book, don't use it.

5. If you contemplate using a title of an old book, play, motion picture or musical composition, check carefully for possible recent republications of the book, especially pocket book; if a play, recent revivals; if a picture, reissues or television use.

6. Avoid a suggestive or vulgar title.

7. Once you adopt a title, continue its use to avoid a claim of abandonment.

The foregoing are my suggestions; what a court of equity may decide, from time to time, is problematical.

Remember Selden: The size of the chancellor's foot.

## The Way To Prevent Lawsuits

*(Continued from page 473)*

without exhausting all means of a settlement out of court.

4. Don't lose your temper in the settlement negotiations.

5. Don't force a settlement; a conflict has natural growth—birth, life and death. And, whatever you do, don't sell your client down the river.

6. Never tell your opponent or his lawyer that he is *wrong*: that little word can cost you the case. Remember always that you can catch more flies with a drop of honey than with a gallon of gall.

7. Don't bluff; bluffing is inimical to fair play.

8. Don't ever go to a conference room to settle a case unless you are thoroughly familiar with facts and the law. Unless there are strong reasons to the contrary, take your client along with you—but, again, voiceless.

9. Don't be a "fixer"; be always every inch a lawyer: in court, an advocate; out of court, a counselor.

10. Don't ever seek, in the settlement of a case, the aid or influence of any friend of your client's adversary—his boss, for instance. You will never be forgiven for that because it amounts to ridicule; and there is nothing more ridiculous than to be ridiculous. Besides, it settles nothing.

### *Can Law Schools Help?*

In conclusion, it would be well if this subject of settling cases out of court would gain the attention of the law schools, in the same way that the subject of effective legal writing has at last caught the eye of the large universities. That would, in a way, result in less litigation, to the great relief of our courts of justice, which, as we all know, are plagued by clogged dockets. Too many, just too many lawsuits, are started unnecessarily and slow down the march of justice. To correct this defect, the law schools can help, and each and every lawyer can do his bit, too.

To repeat a statement made early in this article: not every controversy can be settled extrajudicially, no; but almost all, yes. And when you "win" a case out of court, when through your own efforts and generalship you bring the disputing parties together in your own office and change discord to accord, you have indeed rendered a splendid service to the cause of justice—man's greatest interest on this planet!

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# Association Calendar

### *Annual Meetings*

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| Greater Miami Beach Area, Florida | August 24-28, 1959 |
| Washington, D. C. | August 29-September 2, 1960 |

### *Board of Governors Meeting*

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| Spring Meeting, Washington, D. C. | May 17-19, 1959 |

### *Regional Meetings*

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| Memphis, Tennessee | November 12-14, 1959 |
| Houston, Texas | November 9-12, 1960 |